Supreme Court, U.S.
FILED

(1)

No. 03-826 NOV 26 2003

IN THE

Supreme Court of the United States

DIANA L. READ,

Petitioner,

v.

ALEX BROWN, *et al.*,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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62 pp

QUESTIONS PRESENTED

1. Does this Court's *Desert Palace* decision apply at the summary judgment phase of litigation, and if so, what is its impact?

2. Does *Desert Palace* apply to discrimination cases under the ADEA?

3. What are the appropriate standards for lower courts to follow in making a direct-evidence determination in discrimination cases under Title VII and the ADEA?

4. Does direct evidence of age discrimination expire as a matter of law, and if so, after how long?

5. Under *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 L.Ed.2d 105 (2000) may the court on summary judgment require "substantial evidence" of pretext, ignore the plaintiff's best pretext evidence and restate the other pretext evidence in the light most favorable to the summary judgment movant?

LIST OF PARTIES AND RULE 29.6 LIST

The parties before the Court of Appeals and this Court are listed below. To Petitioner's knowledge, BT Alex Brown, Inc. has no parent companies or non-wholly owned subsidiaries.

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES AND RULE 29.6 LIST	ii
TABLE OF AUTHORITIES	vi
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
A. Nature of the Case and Proceedings Below	2
B. Factual Background	3
REASONS FOR GRANTING THE WRIT	8
I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS AND THE IMPORTANCE OF ESTABLISHING WHETHER *DESERT PALACE* APPLIES AT THE SUMMARY JUDGMENT PHASE, AND IF SO, WHAT IS ITS IMPACT	9
II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS AND THE IMPORTANCE OF ESTABLISHING WHETHER *DESERT PALACE* APPLIES UNDER THE ADEA AS WELL AS UNDER TITLE VII	12

TABLE OF CONTENTS—Continued

Page

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS OVER THE DEFINITION OF DIRECT EVIDENCE, THE CONFLICT BETWEEN THE FIFTH CIRCUIT RULE AND *PRICE WATERHOUSE V. HOPKINS* AND THE NEED FOR A WORKABLE DEFINITION 16

IV. THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS IN GIVING EFFECT TO *REEVES* AND THE IMPORTANCE OF ADHERING TO *REEVES* AND OTHER DECISIONS OF THIS COURT 22

A. The Fifth Circuit in *Read* Breaks With All Other Circuits and Undermines Important Rulings of this Court by Ruling that Direct Evidence of Prohibited Discrimination Expires as a Matter of Law; If Direct Evidence "Expires," It Is Important to Know the Shelf Life of Direct Evidence 22

B. The Fifth Circuit in *Read* Departs from All Other Circuits and Undermines *Reeves* by Ruling That Nonmovants Asserting Pretext Must Have "Substantial Evidence" of Pretext, Ignoring Nonmovant's Best Pretext Evidence and Restating Her Other Evidence of Pretext in the Light Most Favorable to the Employer 24

TABLE OF CONTENTS—Continued

Page

1. In *Read* the Fifth Circuit Requires the Movant to Have "Substantial Evidence" of Pretext 24

2. In *Read* the Fifth Circuit Reverts to its pre-*Reeves* Summary Judgment Approach of Omitting Favorable Evidence to the Nonmovant and Viewing Evidence in Favor of the Employer 26

CONCLUSION 29

APPENDICES 1a

TABLE OF AUTHORITIES

CASES	Page
Allen v. City of Pocahontas, Arkansas, 340 F.3d 551, 557 (8th Cir. 2003)	11
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986)	26
Bauer v. Albemarle Corp., 169 F.3d 962, 966 (5th Cir. 1999)	13
Blow v. City of San Antonio, Texas, 236 F.3d 293, 296 (5th Cir. 2001)	23
Bolander v. BP Oil Co., _ F.Supp.2d _, 2003 WL 22060351 (N.D.Ohio, 2003)	14
Campetti v. Career Educ. Corp., _ F.Supp.2d _, 2003 WL 21961438 (E.D.Pa. 2003)	11
Dare v. Wal-Mart Stores, Inc., 267 F.Supp.2d 987, 992 (D.Minn. 2003)	11, 12
Davis v. Emery Worldwide Corp., 267 F.Supp.2d 109, 120, fn.2 (D. Me. 2003)	11
Desert Palace v. Costa, __ U.S. __, 123 S.Ct. 2148 (2003)	8-19
Dugan v. Albermarle County School Board, 293 F.3d 716, 721 (4th Cir. 2002)	25
Dunbar v. Pepsi-Cola General Bottlers of Iowa, Inc., _ F.Supp.2d _, 2003 WL 22290229 *11 (N.D.Iowa, 2003)	11
Fisher v. Transco Services-Milwaukee, Inc., 979 F.2d 1239, 1245, n. 4 (7th Cir. 1992)	15
Gonzales v. City of Minneapolis, 267 F.Supp. 1004, 1010 (D. Minn. 2003)	11
Goodman v. Pennsylvania Turnpike Comm., 293 F.3d 655, 673-74 (2nd Cir. 2002)	25
Griffith v. City of Des Moines, _F.Supp.2d _, 2003 WL 21976027 (S.D. Iowa, 2003)	11
Hornsfeld v. City of North Miami Beach, 29 F. Supp.2d 1357, 1365 (S.D. Fla 1998)	15

TABLE OF AUTHORITIES—Continued

Page

Jackson v. Catholic Charities, _F.Supp.2d _, 2003 WL 22533330, *2 (D.Minn. 2003)..... 11
Kozlowski v. Hampton School Bd., _ F.3._, 2003 WL 22273073, *4 (4th Cir. 2003)..... 14
McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 1825-26 (1973).....10-12, 15, 18
McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 115 S.Ct. 879 1995)..... 15
Mickle v. Morrin, 297 F.3d 114, 120 (2nd Cir. 2002)..... 27
Miller-El v. Cockrel, 537 U.S. 322, 123 S.Ct. 1029 (2003)..... 24
O'Neal v. City of New Albany, 293 F.3d 998, 1005 (7th Cir. 2002) 25
Otero v. Bridgeport Housing Authority, 297 F.3d 142, 151 (2nd Cir. 2002) 27
Price Waterhouse v. Hopkins, 490 U.S. 228, 104 L.Ed. 2d 268 (1989)..... 18, 20
Rangel v. El Paso Natural Gas Co., 996 F.Supp. 1093, 1097 (D.N. M. 1999) 15
Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147 L.Ed.2d 105 (2000).....9, 15, 21, 23-26
Rowland v. American General Finance, Inc., 340 F.3d 187 (4th Cir. 2003) 13
Sandstad v. CB Richard Ellis, Inc., 309 F.3d 893, 897 (5th Cir. 2002) 21
Skomsky v. Speedway Superamerica, L.L.C., 267 F.Supp.2d 995, 1000 (D. Minn. 2003)..... 15
Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 67 L.Ed 2d 207 (1981)..... 17

TABLE OF AUTHORITIES—Continued

	Page
Thompson v. Proviso Township High Schools Dist. 209, _ F.Supp.2d _, 2003 WL 21638808, *8 (N.D.Ill. 2003)	11, 13
Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, S.Ct. 613, L. Ed.2d 523 (1985)	15
United States v. Grimes, 244 F.3d 375, 384-85 (5th Cir. 2001)	23
United States v. Leal, 74 F.3d 600, 606 (5th Cir. 1996)	23
Winarto v. Toshiba America Electronics Components, Inc., 274 F.3d 1276 (9th Cir. 2001)	27
Wright v. Southland Corporation, 187 F.3d 1287, 1293 fn.8 (11th Cir. 1999)	16, 18-19, 21-22

STATUTES

28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	3
29 U.S.C. § 621 *et seq*	2
29 U.S.C. § 623(a)	2
29 U.S.C. § 626(c)	3
42 U.S.C. § 2000(e)	2
42 U.S.C. § 2000(e)(2)	2-3
42 U.S.C. § 2000e-2(a)(1)	15

RULES

SUP. CT. R. 13.3	2
SUP. CT. R. 14.1(f)	2

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PETITION FOR WRIT OF CERTIORARI

Diana L. Read prays for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on July 30, 2003.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is unpublished and a copy is contained in the Appendix attached hereto. *See* App. A.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) to review a decision of the United States Court of Appeals for the Fifth Circuit by a writ of certiorari after rendering judgment. The decision for which review is sought

was entered on July 30, 2003. Read timely filed a Petition for Rehearing En Banc, which was denied on August 28, 2003. *See* App. B. Pursuant to SUP. CT. R. 13.3, this petition for writ of certiorari is timely because it is being filed within ninety days after the Fifth Circuit denying the Petition for Rehearing.

STATUTES INVOLVED

This case involved age and gender discrimination under Title VII, 42 U.S.C. § 2000(e) and the ADEA, 29 U.S.C. § 621 *et seq.*

29 U.S.C. § 623(a) prohibits age discrimination and states "It shall be unlawful for an employer (1) . . to discharge any individual or otherwise discriminate any individual . . . because of such individual's age . . ."

42 U.S.C. 2000(e)(2) prohibits gender discrimination and states "It shall be an unlawful employment practice for an employer—(1) . . . to discharge any individual, or otherwise discriminate against any individual . . . because of such individual's . . . sex . . . ."

The Appendix contains the full text of these statutes pursuant to SUP. CT. R. 14.1(f). *See* App. C-D.

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

Read filed her age and gender discrimination complaint and jury demand on July 28, 1999. On January 7, 2002, the district court granted Brown's summary judgment motion and dismissed Read's claims. On January 22, 2002, Read filed a motion for reconsideration and motion to alter and amend judgment. On January 24, 2002, the district court issued an order denying Read's motion for reconsideration and to alter and amend judgment. Read timely appealed to the United States Court of Appeals for the Fifth Circuit on February 8, 2002. Following oral argument, a three-judge panel of the

Fifth Circuit affirmed the judgment of the district court on July 30, 2003. *See* App. A. Read timely filed a petition for rehearing en banc which was denied on August 28, 2003. *See* App. B.

The district court had jurisdiction over Read's claims under the ADEA, 29 U.S.C. § 626(c), Title VII, 42 U.S.C. § 2000(e)(2) and 28 U.S.C. § 1331 (general federal question jurisdiction).

B. Factual Background

Read is a female born February 13, 1946. Read began her career as an investment broker at Merrill Lynch in 1983. BT Alex Brown (Brown) hired Read in April 1994, after Read initially interviewed with Office Manager Mike Crossley. Jeff Rupp also attended Read's interview, but Mike Crossley made the ultimate hiring decision.

Crossley promoted Read to Vice President in six months based on her performance. During the first eight months of Read's career at Alex Brown, Mike Crossley remained her supervisor. Crossley provided Read the support she needed. Crossley spent "real time" with Read to help her develop business. Crossley returned Read's phone calls and responded to her requests. Read had minimal interaction (only one specific meeting) with Jeff Rupp during this period. During this single meeting Rupp apologized to Read for having ignored her and asked her to attend a meeting with him in West Texas. Rupp gave a sexist explanation: he desired Read's presence in West Texas because he was going to call on a female CFO of a trucking company and Read, a female, would be good to take.[1] In fact, Rupp did not take Read to West Texas and Read never attended any sales call with Rupp.

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[1] This is ageist and/or sexist statement number 1 by Rupp.

Brown gave Mike Crossley's Office Manager job to Jeff Rupp in January 1995. Shortly after Rupp became office manager, Read invited Rupp to breakfast where Rupp told Read that "when brokers get older, they slow down." Rupp told Read that he considered her to be "one of the old ones."[2] Rupp told Read (then age 48 or 49) that he hoped although she was older, she was not going to be slow.[3] Rupp continued to ignore and under support Read. Rupp assigned Read's assistant, Molly to several brokers. Read told Rupp that Molly was unable to accomplish Read's work. After a long delay, Rupp replaced Molly with Sean Power.

Rupp had another candidate for the assistant position, a woman in her mid-forties with considerable experience who was preferred by the brokers. Rupp explained that he hired Power because a male employee would be desirable and because he would like to hire a young man, straight out of college, who would show the "girls . . . how to work."[4] Power did not provide Read the assistance she needed. Read told Rupp about this problem. Rupp would not directly discuss the adequacy of her support. Rupp failed to return Read's phone calls and would not speak with her. The situation with Power never improved.

Rupp provided great support and responded to the male brokers. Jay Ellis, a male broker, testified that once Rupp was asked to do something "he was always willing to help." Steve Kenney, a male broker, testified that Rupp never refused to give Kenney requested support. Kenney testified that Rupp would make time for him if the matter was urgent. Rupp testified that he attended more meetings "than he could

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[2] This is Rupp's discriminatory statement number 2.

[3] This is discriminatory statement number 3 by Rupp.

[4] This is discriminatory statement number 4 by Rupp, combining sex and age animus.

ever count" with male brokers Durso and High and admitted that there were brokers (all the other brokers were male) with whom he spent more time than Read.

Jeff Rupp actively participated in client meetings with male brokers. The male brokers touted Rupp's ability to close a deal. Jay Ellis testified that he would look to Rupp for support and that Rupp was supportive of Ellis' efforts to grow his business and would attend client meetings with Ellis. Many of Ellis' clients were based in Phoenix and Rupp would travel to meet with them. Steve Kenney testified that Rupp attended roughly a third of his client meetings and that Rupp would definitely "meet with his clients when asked to do so." Other than a single trip to San Antonio, Rupp took no prospecting trips with Read.

Rupp also treated younger and male brokers with more respect than he treated Read (who for most of the time was the only female broker in the office and who was always the only "old," at least per Rupp, female broker in the Dallas office). Rupp yelled at Diana Read in public and was condescending towards her in public. Rupp responded rudely to Read's questions at weekly staff meetings. Rupp's voice and tone insinuated that Read's questions were unwarranted. Male brokers observed Rupp treat Read in a rude and condescending manner. In contrast, male brokers testified that Rupp was never rude to them in public. Rupp did not testify he was rude and condescending to both his male and his female brokers. There is no evidence of comparable rudeness by Rupp to any male broker.[5]

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[5] The Fifth Circuit decision injects the word "yelled"and states: "Read admitted that Rupp also yelled at a male broker . . . ." (App. at 11a) The situation was very different than incidents where Rupp was rude to Read. The male broker was being rude to Rupp and Rupp reacted. Read testified: "He—we were in a business meeting and Jay was standing behind him opening and closing cabinets or something like that, and Jeff

Read's annual production grew each year during her tenure at Alex Brown. In 1996, Rupp told Read he was not at all worried about her production level. During the fall of 1998 (shortly before he fired Read), Rupp made a passing comment to Read that he had a problem with her production being at $350,000. Read immediately evaluated her production and found that her trailing twelve months of production was $403,296. Read prepared a business plan showing how she expected to improve her production, contacted Rupp and asked for his feedback, but Rupp never followed through after their initial meeting to discuss Read's business plan.

Rupp told Read that her employment was terminated on December 1, 1998. Rupp told Read that she was being terminated as a result of cost-cutting and that she had failed to meet the cut off of $467,000. Read asked why she would be terminated if she was bringing in over $400,000 in commissions. Rupp replied that the cut-off was $467,000. Read called Tim Schweitzer and stated she liked her job at Alex Brown and that she anticipated doing over $400,000 in commissions this year. Schweitzer replied that the cut-off was $467,000 and thus, Read had to be terminated.[6] Read, female, age 52, was the only broker fired in the Dallas office,

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turned around and *told him* to be quiet or something like that, and he did it in a rather rude manner." (Emphasis added.)

[6] Schweitzer approved the decision to terminate Read.

and she produced comparably or better than five younger and or male brokers:

NAME	SEX	AGE	1988 PRODUCTION
Roger Blackmar	Male	67	$231,775
Bruce Durso	Male	47	$358,855
Chris High	Male	25	$149,181
Jaime Palmer	Male	25	$3,120
Diana Read	Female	52	$297,568* * Per Brown's calculations. Read's evidence shows her production was actually $403, 296.
Lynda Villarreal	Female	28	$10,786

After telling Read she was being terminated, Rupp made a statement indicating both (1) gender bias and (2) that the real reason for termination was not lack of production during Read's job search process. A manager at Oppenheimer who was considering Read for employment asked Rupp why he would choose to terminate a producer like Read. Rupp did not say that Read was not a "producer." Rupp explained his rationale for terminating Read by comparing Alex Brown to Goldman Sachs. Rupp said that Alex Brown is like Goldman Sachs and that Read just did not fit the mold.[7] Goldman Sachs is historically known not to hire women.

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[7] This is discriminatory statement number 5 by Rupp.

On May 25, 1999, Read filed her charge of age and sex discrimination. Brown disclaimed the "reason" that both Rupp and Schweitzer told Read for her termination, that she had failed to meet the $467,000 production cut-off. Brown kept at least 174 out of 449 brokers nationwide, including 5 other brokers out of 35 in the Dallas office, who failed to meet the "cut-off." In the Dallas office, Brown (and Rupp) kept 4 male brokers who missed the $467,000 cutoff (3 men with lower production than Read) and a young female broker whose production for 1998 was $10,786, far below both Read and the $476,000 cut-off.

Brown denied that Rupp or Schweitzer had given the $467,000 production cutoff reason to Read. Brown admitted that there was no $467,000 cutoff. Brown used an "evolved" reason, still mentioning production, but omitting the $467,000 production cutoff. Brown's interrogatory response claims that Read was terminated "[a]s part of a national expense management reduction process within Bankers Trust and its subsidiaries, the Private Client Division in the Dallas office was required to reduce its expenses. Plaintiff's employment was terminated as a part of this process due to her performance."

REASONS FOR GRANTING THE WRIT

Compelling reasons exist for granting certiorari. The Fifth Circuit's decision in *Read v. BT Alex Brown Inc.* (App. A) discloses a split between the circuits on several important matters. First, there is a split on whether this Court's decision in *Desert Palace v. Costa*, __ U.S. __, 123 S.Ct. 2148 (2003) has any impact on summary judgment analysis, and if so, the extent of the impact. Second, the *Read* decision reveals a split in the circuits on whether *Desert Palace*, a Title VII case, applies to ADEA cases. Third, *Read* applies a definition of "direct evidence" on which the circuits remain sharply split. Fourth and Fifth, the Fifth Circuit in *Read* departs from all the other Circuits by (1) ruling that direct

evidence of discrimination, in effect, lapses -- direct evidence becomes irrelevant after some unspecified amount of time -- and (2) ruling that despite this Court's teachings in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 L.Ed.2d 105 (2000)(reversing the Fifth Circuit), a nonmovant asserting pretext must have "substantial evidence" of pretext, ignoring the nonmovant's best pretext evidence and restating the other pretext evidence in the light most favorable to the movant (employer).

Besides the conflict between the circuits in the Fifth Circuit's *Read* decision, *Read* decides crucial questions of federal law that have not, but should be settled by this Court. In the *Read* case, the Fifth Circuit (1) apparently held that *Desert Palace*, a Title VII case, applies equally to ADEA claims, but (2) mentioned *Desert Palace* only for the proposition that the plaintiff bears the ultimate burden of proving intentional discrimination. The Fifth Circuit analysis indicated that *Desert Palace* has no impact at all on summary judgment analysis. Whether *Desert Palace* applies to ADEA claims, and the effect, if any, of *Desert Palace* on Title VII and ADEA claims attacked on summary judgment, are questions of primal importance

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS AND THE IMPORTANCE OF ESTABLISHING WHETHER *DESERT PALACE* APPLIES AT THE SUMMARY JUDGMENT PHASE, AND IF SO, WHAT IS ITS IMPACT.

The courts are split on whether *Desert Palace*, which dealt expressly with whether direct evidence was necessary to entitle a claimant to a mixed-motive jury instruction, applies to the courts themselves in their summary judgment analyses. In other words the courts are split on the question of whether juries have one proof mechanism, one where the proof of pretext is not essential for establishing liability in indirect

evidence cases, while the district (and appeals) courts apply different law, law where a plaintiff with only indirect evidence and insufficient evidence of pretext to raise a jury issue must lose.

Besides the obvious impact of *Desert Palace* at the trial phase of discrimination cases, the decision, by shifting the burden of proof to the employer when there is evidence of discrimination, certainly should (despite the Fifth Circuit's approach in *Read*) affect summary judgment practice, thus touching every federal discrimination case, not just those that proceed to trial. Commentators on *Desert Palace* led with the impact of the decision on summary judgment practice. *See* Lawyers Weekly USA, June 23, 2003 at p. 1, Col. 3 and p. 27, Col. 3. After all, under *Desert Palace*, the jury (so why not the judge) applies law that states a plaintiff with evidence (direct or indirect) of prohibited discrimination prevails unless (and the burden shifts to the defendant on this) the defendant establishes by a preponderance of the evidence that it "would have treated the plaintiff similarly even if plaintiff's gender played no role in the employment decision." *Desert Palace, supra*,123 S.Ct. at 2152 (citing the district court's jury instruction). Diana Read either does or does not have a right to have this law applied by the district (and appeals) court to her evidence.

The Fifth Circuit in *Read* dismisses *Desert Palace* as a jury instruction case. *Read* gives *Desert Palace* no impact on the summary judgment analysis, citing to *Desert Palace* but employing pre-*Desert Palace* analysis. Specifically, the Fifth Circuit, within a sentence after citing *Desert Palace*, applies an analysis that gives *Desert Palace* no effect whatever in the summary judgment process. Per the Fifth Circuit in *Read*, direct or indirect evidence are the options, and with indirect the *McDonnell Douglas-Burdine* burden-shifting framework applies. App. A at 5a. Similarly, a district court in the First Circuit effectively precludes application of *Desert Palace* in summary judgment analysis by ruling that, as a matter of law,

the evidence permits "no possibility of a mixed motive for the defendant's actions with respect to this incident." *Davis v. Emery Worldwide Corp.*, 267 F.Supp.2d 109, 120, fn.2 (D. Me. 2003).

The Eighth Circuit has noted, but not decided, the question of whether *Desert Palace* alters the burden-shifting analysis of *McDonnell Douglas* (ruling that the result would be the same, summary judgment affirmed, under either analysis). *Allen v. City of Pocahontas, Arkansas*, 340 F.3d 551, 557 (8th Cir. 2003). Meanwhile, district courts within the Third, Seventh and Eighth Circuits expressly hold that *Desert Palace* law applies during the summary judgment process. *Jackson v. Catholic Charities*, _F.Supp.2d _, 2003 WL 22533330, *2 (D.Minn. 2003); *Dunbar v. Pepsi-Cola General Bottlers of Iowa, Inc.*, _ F.Supp.2d _, 2003 WL 22290229 *11 (N.D.Iowa, 2003); *Thompson v. Proviso Township High Schools Dist. 209*, _ F.Supp.2d _, 2003 WL 21638808, *8 (N.D.Ill. 2003); *Griffith v. City of Des Moines*, _F.Supp.2d _, 2003 WL 21976027 (S.D. Iowa, 2003); *Campetti v. Career Educ. Corp.*, _ F.Supp.2d _, 2003 WL 21961438 (E.D.Pa. 2003); *Dare v. Wal-Mart Stores, Inc.*, 267 F.Supp.2d 987, 992 (D.Minn. 2003); *Gonzales v. City of Minneapolis*, 267 F.Supp. 1004, 1010 (D. Minn. 2003).

The most thorough analysis of *Desert Palace* and the law for purposes of summary judgment is in the opinion of Chief Judge Bennett of the Northern District of Iowa in *Dunbar v. Pepsi-Cola General Bottlers of Iowa, Inc.*, _ F.Supp.2d _, 2003 WL 22290229 *9-15 (N.D. Iowa, 2003). More succinctly, Chief Judge Longstaff of the Southern District of Iowa defines the post *Desert Palace* test for surviving summary judgment:

> This Court . . . finds that a plaintiff may bring his Title VII claim "according to the burdens articulated in [the] Civil Rights Act of 1991," without being confined to the

> strictures of the *McDonnell Douglas* burden-shifting framework. [*Citing Dare, supra.*]
>
> . . . Thus, to survive summary judgment, plaintiff must simply demonstrate that a genuine issue of material fact exists as to whether or not race was a motivating factor in an adverse employment action defendant [sic] suffered.

In *Dare*, cited by both Chief Judges Bennett and Longstaff, Judge Magnuson of the District Court of Minnesota explained:

> The dichotomy produced by the *McDonnell Douglas* framework is a false one. In practice, few employment decisions are made soley on the basis of one rationale to the exclusion of all others.

Dare v. Wal-Mart Stores, Inc., 267 F.Supp.2d 987, 991 (D.Minn. 2003).

The courts who consider summary judgment motions face a choice. They can continue to apply the false dichotomy of pre *Desert Palace* analysis, or they can apply an analysis that is consistent with the law the jury will be given if the plaintiff survives summary judgment. It is important for this Court to decide soon which is correct, the Fifth Circuit's approach in *Read*, where *Desert Palace* law has no place in deciding summary judgment motions, or the emerging caselaw that applies *Desert Palace* at the summary judgment stage.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS AND THE IMPORTANCE OF ESTABLISHING WHETHER *DESERT PALACE* APPLIES UNDER THE ADEA AS WELL AS UNDER TITLE VII.

The Circuits are split as to whether *Desert Palace* applies to ADEA cases. *Desert Palace* is a Title VII decision. *Desert Palace* answered an important question concerning the

availability of mixed-motive jury instructions under Title VII. The Court's ruling hinged on the 1991 Civil Rights Act, an act which did not amend the ADEA. *Desert Palace* predictably has spawned arguments by ADEA defendants that this Title VII ruling has no application under the ADEA and the contrary argument by ADEA plaintiffs. *See* Lawyers Weekly USA, June 23, 2003 at p. 1 and p. 27, Col. 4. *Read* is both a Title VII (gender) and ADEA (age) case. Thus, *Read* squarely poses the question of whether ADEA plaintiffs face a higher evidentiary burden than Title VII claimants.

The lower circuits and lower courts are providing different answers to this outcome determinative question.[8] Although the Fifth Circuit in *Read* gave *Desert Palace* no impact on the summary judgment analysis, citing to *Desert Palace* but employing pre-*Desert Palace* analysis (direct evidence or indirect evidence are the options, and with indirect the *McDonnell Douglas-Burdine* burden-shifting framework applies)(App. A at 5a), the Fifth Circuit held, "'The same evidentiary procedure for allocating burdens of proof applies to discrimination claims under [either Title VII or the ADEA].'" *Read*, App. A at 5a, *citing Bauer v. Albemarle Corp.*, 169 F.3d 962, 966 (5th Cir. 1999). Within the Seventh Circuit, a district court has applied the *Desert Palace* proof standard to an ADEA claim. *Thompson v. Proviso Township High Schools Dist. 209*, _ F.Supp.2d _, 2003 WL 21638808, *8 (N.D.Ill. 2003).

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[8] The Fourth Circuit in *Rowland v. American General Finance, Inc.*, 340 F.3d 187 (4th Cir. 2003), reversed a jury verdict because the plaintiff had been denied a *Desert Palace* mixed motive instruction. Judge Motz explained: "Moreover, there is no question that without the mixed-motive instruction, Rowland had almost no chance of prevailing. Had the district court given the requested instruction, on the other hand, it is at least possible that the jury would have found that gender was 'a motivating factor' in American General's failure to promote Rowland." *Id.* at 194.

Meanwhile, the Fourth Circuit has noted the question of whether *Desert Palace*, at Title VII case, applies to age discrimination cases under the ADEA. *Kozlowski v. Hampton School Bd.*, _ F.3._, 2003 WL 22273073, *4 (4th Cir. 2003). The Fourth Circuit declined to answer that question. *Id.* A district court in the Sixth Circuit has flatly, but without analysis, ruled that *Desert Palace*, a Title VII case, does not apply to age discrimination cases. *Bolander v. BP Oil Co.*, _ F.Supp.2d _, 2003 WL 22060351 (N.D.Ohio, 2003). It is readily apparent that a full fledged and outcome determinative split between the circuits is upon us and that the High Court should step in early with clarification.

For the well-being of the federal court system, it is critical that *Desert Palace* have a companion case, where this Court determines the proof mechanism in ADEA cases. In virtually every case where the plaintiff has evidence of age discrimination and the defendant asserts that some other reason, not age, triggered the firing, unless the defendant yields to a *Desert Palace* proof analysis for summary judgment and jury instruction for trial,[9] the lower court judges must decide whether the ADEA and Title VII are different on the all important question of proof. Unless and until this Court resolves that inevitable question, every ADEA case that goes to trial in the United States is subject to reversal on this question.

There is a powerful federal interest in uniformity of proof mechanisms in federal anti-discrimination laws. The courts, litigants and practitioners will face a procedural nightmare if juries must parse through different proof mechanisms, in the

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[9] The Fourth Circuit in *Kozlowski*, *supra*, 2003 WL 22273073, *4, was not required to answer whether *Desert Palace* applied to an ADEA case because it found that the district court's jury "instruction satisfied *Desert Palace* even if that decision applies to the ADEA."

same trial, depending upon the basis of the discrimination claim. Aside from using "age" in the ADEA and "race, etc." in Title VII, the two laws employ essentially identical prohibitory language. The Supreme Court has used practically identical interpretive regimes when applying the two laws. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 621-22, 83 L. Ed.2d 523 (1985). Numerous courts, even after the passage of the 1991 Civil Rights Act (which did not amend the ADEA), have continued to construe Title VII and the ADEA in a consistent manner. *See, e.g. McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 115 S.Ct. 879, 884, 885 (1995); *Fisher v. Transco Services-Milwaukee, Inc.*, 979 F.2d 1239, 1245, n. 4 (7th Cir. 1992); *Rangel v. El Paso Natural Gas Co.*, 996 F.Supp. 1093, 1097 (D.N. M. 1999); *Hornsfeld v. City of North Miami Beach*, 29 F. Supp.2d 1357, 1365 (S.D. Fla 1998). Within the Eighth Circuit, based on the "interests of uniformity" in Federal anti-discrimination laws, a district court has already held that *Desert Palace*, at Title VII case, applies to ADA disparate treatment claims, including perceived disability claims. *Skomsky v. Speedway Superamerica, L.L.C.*, 267 F.Supp.2d 995, 1000 (D. Minn. 2003).

In *Reeves* (an ADEA case), the Court noted:

> This Court has not squarely addressed whether the *McDonnell Douglas* framework, developed to assess claims brought under § 703(a)(1) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, 42 U.S.C. § 2000e-2(a)(1), also applies to ADEA actions. Because the parties do not dispute this issue, we shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147 L.Ed2d 105, 120 S.Ct. 2097, 2105 (2000)(emphasis added). While plaintiffs and defendants may not dispute the applicability of the *McDonnell Douglas* framework in ADEA

cases, they certainly will dispute the applicability of *Desert Palace*, because of its burden shifting feature. Stated another way, this issue will not "wait." The courts are at a crossroads. They can either continue on the road with a map, so they know with certainty whether *Desert Palace* applies in ADEA cases, or they can litigate this issue in every ADEA case until the Court gives direction. Litigating all ADEA cases with no map on this determinative issue will waste untold judicial resources. Every case where the judge was "wrong" has to be redone.

The district courts are *now* faced with the "reversible error" question of whether the Court's holding in *Desert Palace* applies in ADEA cases. A ruling to the contrary would place age discrimination claimants in substantially worse position than Title VII claimants and undermine the interests of uniformity in discrimination litigation. There is now a compelling need for swift resolution of this issue. No ruling, the result if certiorari is not granted for Read, will cripple the lower courts in ADEA cases for the foreseeable future.

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS OVER THE DEFINITION OF DIRECT EVIDENCE, THE CONFLICT BETWEEN THE FIFTH CIRCUIT RULE AND *PRICE WATERHOUSE V. HOPKINS* AND THE NEED FOR A WORKABLE DEFINITION

Defining "direct evidence" properly in employment discrimination cases is important for two main reasons. First, (at least prior to *Desert Palace*) direct evidence was one of two basic proof schemes [10] available to a plaintiff. *Desert*

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[10] The Eleventh Circuit in *Wright v. Southland Corporation*, 187 F.3d 1287, 1293, fn. 8 (11th Cir. 1999) observed that a third method of proving discriminatory treatment, statistical proof of a pattern of discrimination,

Palace held that "direct evidence" is not required in order to prove employment discrimination in mixed-motive cases under Title VII. The Court stated:

> Of course, in light of our conclusion that direct evidence is not required under § 2000e-(2)(m), we need not address the second question on which we granted certiorari: "What are the appropriate standards for lower courts to follow in making a direct-evidence determine-ation in 'mixed motive' cases under Title VII?" Pet. for Cert. i.

Desert Palace, supra, 123 S.Ct. at 2155, fn. 3. While the litigants in *Desert Palace* had no need for the Court to address the conflict between the circuits as to the definition of direct evidence, the circuits and the lower courts still need guidance. The Fifth Circuit's decision in *Read* is proof. The Fifth Circuit cited *Desert Palace* (App. A at 5a), but affirmed summary judgment against Diana Read by scrutinizing her proof under its harsh, dictionary definition of direct evidence (App. A at 12a). Certainly until and unless this Court answers Question 1 in this petition for certiorari in the affirmative, the direct evidence split in the circuits means the difference between being able to enforce discrimination laws and being doomed to defeat in the absence of a confession.

The pre and post *Desert Palace* inquiry about direct evidence flows from several landmark decisions. As the Court explained in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 67 L.Ed 2d 207, 256 (1981), after an

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may be a separate and distinct method of proving discriminatory treatment. *Id.* at 1293, fn. 8. Both the district and appeals court in *Read* do not disclose critical context evidence. Out of 19 to 26 brokers in the Dallas office, except for a brief period after a much younger, and unqualified female, Lynda Villareal, was promoted to broker along with Read, Read was the one and only female broker in the office throughout her tenure with Brown.

employment discrimination claimant makes a *prima facie* case and the defendant meets its burden of production by presenting a legitimate, non-discriminatory reason, the plaintiff retains the burden of persuading the court that he "has been a victim of intentional discrimination." *Id.* The plaintiff "may succeed in this either *directly* by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* (emphasis added)(citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 1825-26 (1973). Thus, direct evidence obviates the need for a pretext analysis under *McDonnell Douglas*. As explained by the 11th Circuit in *Wright v. Southland Corporation*, 187 F.3d 1287, 1293:

> The importance of properly defining "direct evidence" arises from our repeated statements that when a plaintiff has direct evidence of illegal discrimination, he need not make use of the *McDonnell-Douglas* presumption, and conversely, when he does not have such evidence, he is required to rely on the *McDonnell-Douglas* presumption.

Prior to *Desert Palace*, the second reason "direct evidence" had an important meaning in employment discrimination was that it would trigger or permit a burden shifting "mixed motive" jury instruction. In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L.Ed. 2d 268 (1989), Justice O'Connor's concurring opinion would permit the use of the mixed motive test only when direct evidence is present. *Id.* at 109 S.Ct. 1775. In this scenario, the burden of persuasion itself may "shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision ... absent consideration of [the protected characteristic]." *Price Waterhouse*, *supra*, 109 S.Ct. at 1796 (O'Connor, concurring opinion). After the Supreme Court's decision in *Desert Palace*, a plaintiff may obtain a mixed-motive jury instruction under Title VII on the basis of circumstantial evidence alone and is not required to submit direct evidence

of discrimination in order to obtain the instruction. *Desert Palace*, 123 S.Ct. 2148, 2155 (2003).

The circuits remain split as to the definition of "direct evidence." Some circuits require substantial evidence of discriminatory animus to constitute "direct evidence." The Eleventh Circuit in *Wright*, *supra*, 187 F.3d at 1293 holds:

> "[D]irect evidence," in the context of employment discrimination law, means evidence from which a reasonable trier of fact could find, more probably than not, a causal link between an adverse employment action and a protected personal characteristic."

This is the "**preponderance definition**" of direct evidence. *Id.* at 1301. *Wright* contrasted the preponderance definition with the "**dictionary definition**," which is "evidence, which if believed, proves the existence of a fact in issue without inference or presumption." *Id.* at 1294. This was the definition in the Eleventh Circuit at the time of the *Wright* decision. The Eleventh Circuit noted the flaw in the dictionary definition:

> The only "eyewitness" to the state of mind of the decisionmaker is the decisionmaker himself. Consequently, the only direct evidence of illegal discrimination under the dictionary definition would be testimony from the decisionmaker that he took an adverse employment action against the plaintiff on the basis of a protected personal characteristic. Any other form of evidence requires at least one inference to reach the conclusion that the employer has impermissibly discriminated.

Id. at 1295 (footnote omitted).

The court in *Wright* also examined Eleventh Circuit precedent. It found that, while the majority of cases stated the dictionary definition of direct evidence, the courts were in practice using the preponderance definition. *Id.* at 1294-1300. "Regardless of the stated definitions of direct evidence

in these cases, however, a look at the actual holdings of these cases reveals that they all rely on the preponderance definition." *Id.* at 1294.

This "preponderance definition" is consistent with logic and the use of the term "direct evidence" by Justice O'Connor in *Price Waterhouse*. In her concurring opinion, Justice O'Connor set out the "direct evidence" requirement as the necessary threshold for triggering mixed motives analysis. *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring in judgement). Justice O'Connor stated that the plaintiff must produce "*direct evidence* that an illegitimate criterion was a *substantial factor* in the [employment] decision." *Id.* (Emphasis added.) Justice O'Connor, as well as the plurality of the Court, was concerned that employment discrimination plaintiffs often cannot pinpoint discrimination as the precise cause of their injury, despite having shown that it played a significant role in the decisional process. Thus, the *Price Waterhouse* burden shifting paradigm was born. *Id.* at 273 (O'Connor, J., concurring opinion). While a dictionary definition of direct evidence effectively requires a confession by the decisionmaker, Justice O'Connor plainly recognized that direct evidence does not require a confession, or even evidence that prohibited discriminatory animus was the sole factor in the adverse employment action. After all, Justice O'Connor was writing about "mixed motive" cases. Thus, a definition that requires "proof of the fact of discriminatory animus without inference or presumption," the Fifth Circuit standard employed in *Read*, goes far beyond the direct evidence required for a mixed motive instruction.

Read states the dictionary definition (App. A at 12a)[11] and applies it where a "preponderance definition," particularly under the summary judgment guidelines set out in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097 (2000), would have easily produced a "direct evidence" label requiring denial of the employer's summary judgment motion. The Fifth Circuit in *Read* discussed three pieces of evidence Read claimed to be direct and found two of them difficient because they both required an inference to be probative of Brown's discriminatory animus in firing Read, so not "direct." (As to Diana Read's evidence the Fifth Circuit concluded "may arguably fall within the definition of direct evidence of discrimination" (App. A at 14a), this evidence, per the Fifth Circuit, was too old. We address this ruling in Part IV of this petition.

The Fifth Circuit's use of the dictionary definition of direct evidence in *Read* illustrates the importance of the question and the wisdom of the Eleventh Circuit's observation that "the general evidentiary rule in federal courts [is] that circumstantial and direct evidence are treated alike. *Wright*, *supra* at 1300. Petitioner respectfully submits that this Court should resolve the split in the circuits and foster the purposes of federal laws against employment discrimination by rejecting the dictionary definition of direct evidence employed by

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[11] The Fifth Circuit cites *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002)(App. At 12a) for the definition of direct evidence as "evidence that, if believed, proves the fact of discriminatory animus without inference or presumption." This Court denied certiorari in *Sandstad* on the question of how to define direct evidence on June 16, 2003, about a month an a half before the Fifth Circuit used the *Sandstad* dictionary definition of direct evidence as a basis for (1) concluding that Diana Read had no direct evidence (except some that was the wrong "vintage"—App. A at 14a) so that (2) when her showing of pretext, in the Fifth Circuit's view, failed, summary judgment was proper.

the Fifth Circuit in *Read* and approving the preponderance definition and this reasoning of the Eleventh Circuit:

> If direct evidence were to mean only evidence that proves discrimination without presumption or inference, then we would have created a system in which a plaintiff would be denied the opportunity to recover for employment discrimination despite the fact that he could prove such discrimination by a preponderance of the (circumstantial) evidence.

Wright, supra at 1301.

IV. THIS COURT SHOULD GRANT CERTIORARI BECAUSE OF A SPLIT IN THE CIRCUITS IN GIVING EFFECT TO *REEVES* AND THE IMPORTANCE OF ADHERING TO *REEVES* AND OTHER DECISIONS OF THIS COURT.

A. The Fifth Circuit in *Read* Breaks With All Other Circuits and Undermines Important Rulings of this Court by Ruling that Direct Evidence of Prohibited Discrimination Expires as a Matter of Law; If Direct Evidence "Expires," It Is Important to Know the Shelf Life of Direct Evidence.

Although the Fifth Circuit mentioned discriminatory statements in its fact recitation (App. A, at 2a-3a), when it disposed of this evidence, the Panel glossed the evidence to one milder version, "Rupp's 1995 comment to Read that brokers tend to slow as they age." *Id.*[12] The Panel conceded this is direct evidence of discrimination but held that "given

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[12] At a breakfast meeting Read invited Rupp to attend after Rupp had ignored her since she had been hired, Rupp told Read that "when brokers get older, they slow down" and that he considered her to be "one of the old ones."

this comment's vintage, as well as Read's failure to identify any other like comments in the course of her four-year tenure with Brown, we cannot view this statement as anything more than a stray remark." [13]

The Panel's "vintage" ruling conflicts with *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2110 and the Fifth Circuit's ruling in *Blow v. City of San Antonio, Texas*, 236 F.3d 293, 296 (5th Cir. 2001).[14] These cases require the court to draw all reasonable inferences in favor of the non-moving party in the light most favorable to the non-moving party. The Panel's "vintage" reasoning relies upon an inference favoring Brown that, as a matter of law, Rupp's age bias against Read somehow disappeared sometime before he fired her. The inference is particularly remarkable since it assumes (as a matter of law) that Rupp's bias against Read disappeared as Read grew older. Moreover, reading the facts in the light most favorable to Read, a jury could reasonably conclude that Rupp's bias remained in play throughout Read's employment with Brown, from the time Rupp ignored her before he became the office manager, through the time of his breakfast declaration, through the time he was rude to her, through the time that he ignored her, through the time he stated he wanted to hire a young man who would show the "girls" how to work, and through the time that he explained after firing Read that she did not fit the mold, the Goldman Sachs image.

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[13] As argued in Section III of this Argument, the Panel erred in ignoring Read's evidence. The second prong of the Panel's reasoning in discarding Read's direct evidence ignores or erases Rupp's discriminatory statements 1, 4, and 5, "like comments" that are in evidence.

[14] The ruling also conflicts with Fifth Circuit holdings under Rule 404(b), F.R.E., that other bad acts evidence is not stale up to 4 years "old," but 10 years is "too great a gap in time." *United States v. Grimes*, 244 F.3d 375, 384-85 (5th Cir. 2001); *United States v. Leal*, 74 F.3d 600, 606 (5th Cir. 1996).

The district court's ruling that, as a matter of law, vintage age bias evidence is irrelevant conflicts with the Supreme Court's decision in *Miller-El v. Cockrel*, 537 U.S. 322, 123 S.Ct. 1029 (2003). *Miller-El* dealt with the Dallas County District Attorney's Office policy of instructing Assistant District Attorneys not to select African Americans for jury service. *Id.* at 1038-9. The Office issued a manual in 1968, in circulation until at least 1976, that included reasons for excluding minorities from jury service. *Id.* The Court found this evidence must be considered in determining whether racial animus prompted peremptory strikes of African American jurors in a 1986 death penalty case. *Id.* at 1034. The Supreme Court held that statements made even more than twenty (20) years before the event in question must be considered. *Id.* at 1045.

The Court should address whether under *Miller-El*, Rupp's ageist statements somehow "expire" after a time (and if so, when) as a matter of law.

B. The Fifth Circuit in *Read* Departs from All Other Circuits and Undermines *Reeves* by Ruling That Nonmovants Asserting Pretext Must Have "Substantial Evidence" of Pretext, Ignoring Nonmovant's Best Pretext Evidence and Restating Her Other Evidence of Pretext in the Light Most Favorable to the Employer.

1. In *Read* the Fifth Circuit Requires the Movant to Have "Substantial Evidence" of Pretext.

In *Reeves*, the Court addressed pretext evidence, holding that "a plaintiff's prima facie case combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves*, 120 S.Ct. at 2109. The Court explained further that in narrow instances a

plaintiff might "set forth sufficient evidence to reject the defendant's explanation," but summary judgment should still be granted:

> For instance, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, non-discriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Id. (emphasis added).

Other circuits have uniformly adhered to this ruling. *See Goodman v. Pennsylvania Turnpike Comm.*, 293 F.3d 655, 673-74 (2nd Cir. 2002); *Dugan v. Albermarle County School Board*, 293 F.3d 716, 721 (4th Cir. 2002); *O'Neal v. City of New Albany*, 293 F.3d 998, 1005 (7th Cir. 2002).

Using a *McDonnell-Douglas-Burdine* analysis (not *Desert Palace*), the Fifth Circuit in *Read* ruled that after a *prima facie* case and defendant's production of a legitimate, non-discriminatory reason, "the plaintiff "thereupon, must produce substantial evidence that the defendant's non-discriminatory reason is merely a pretext for impermissible discrimination." App. A at 6a (emphasis added). *Read* thus rejects a central holding of *Reeves* by converting narrow exceptions into the rule. In *Reeves* this Court, speaking of the Fifth Circuit, stated: "the Court of Appeals misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." *Reeves*, 120 S.Ct. at 2108. Now the Fifth Circuit has recreated its split with the other circuits, who adhere to *Reeves*, and placed an impermissible substantial burden on those who pursue discrimination claims with in direct evidence.

2. In *Read* the Fifth Circuit Reverts to its pre-*Reeves* Summary Judgment Approach of Omitting Favorable Evidence to the Nonmovant and Viewing Evidence in Favor of the Employer.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S.Ct. 2997 (2000), unanimously reversed the Fifth Circuit Court of Appeals, ruling, "it is apparent that respondent was not entitled to judgment as a matter of law." *Id.* at 120 S.Ct. 2110. The Court in *Reeves* did not merely reject the "pretext-plus" special rule of the Fifth Circuit that "misconceived the evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." *Id.* at 2108. The Court in *Reeves* also rejected the Fifth Circuit's approach under Rules 50 and 56, F.R.C.P., by ruling that in judgment as a matter of law and in the summary judgment process[15] the court should review the record as a whole but may not make credibility determinations or weigh evidence and

> must disregard all evidence favorable to the moving party that the jury is not required to believe. *See Wright & Miller*, 299. That is, the court should give credence to the evidence favoring the non-movant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses. *Id.* at 300.

Reeves, *supra*, at 2110. *Reeves* requires that summary judgment judges "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility

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[15] *Reeves* reiterates that "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same. 120 S.Ct. at 2110, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

determinations or weigh the evidence." *Id.* Weighing evidence and drawing inferences from the fact are jury functions. *Id.*

Other circuits have adhered to these rulings. *See Otero v. Bridgeport Housing Authority,* 297 F.3d 142, 151 (2d Cir. 2002); *Mickle v. Morrin*, 297 F.3d 114, 120 (2d Cir. 2002); *Winarto v. Toshiba America Electronics Components, Inc.*, 274 F.3d 1276, 1283 (9th Cir. 2001);

The Fifth Circuit does not adhere to the law of summary judgment as announced in *Reeves*. The Fifth Circuit in *Read* cites *Reeves* (App. A at 4a), does not mention the particulars (like drawing all inferences in favor of Read), then retreats to the same flawed approach that this Court reversed in *Reeves*. The Fifth Circuit used Brown's version of the facts, cited at page 15 of Brown's brief.[16] Citing testimony offered by Brown, the Fifth Circuit concluded, "this testimony, however, does not establish that Brown terminated Read for failing to reach $467,000 in production, nor does it therefore establish that Brown dissembled or changed its reason for discharging Brown from a failure to reach a particular production number to a general failure to perform." (App. A at 16a.)

Diana Read's evidence, however, included this testimony by Read about what Rupp told her: "He said we're cost cutting and the cutoff was 467,000 and that was the reason for my termination is my production was not up to 467,000. (7 R. App. 0136). Read testified that when she called Schweitzer, the first thing he said was:

> He said—I said was I really liked my job and I was going to do over 400,000 this year and why did he see fit to be terminating me, and he said, well the cutoff's 467.

(7R. App. 0140)

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[16] Brown erroneously cited the reference to some of Read's testimony as 3 R. App. 114. The correct cite is 2 R. App. 114. References in Part IV are to the Appellate Record.

The Fifth Circuit disregarded this testimony on summary judgment.

The Fifth Circuit analysis also ignored Read's other evidence that Brown offered inconsistent explanations for her termination. The court notes, "Brown maintains that Read was selected for termination, based on her performance as a broker, in connection with a wider effort to reduce costs." App. A at 15a. In the context of rejecting it as direct evidence, the Fifth Circuit discussed Read's evidence that Rupp told a manager at Oppenheimer who was considering Read for employment that his reason for terminating Read was that Brown is like Goldman Sachs and that Read just did not fit the mold. (7R. App. 00126). App. A at 12a. In the pretext context, the court ignored this evidence that Rupp told a manager at Oppenheimer a reason for terminating Read that has nothing to do with production and provides a reason different from Brown's response to Read's discrimination claim.

Read conflicts with *Reeves* repeatedly as the Fifth Circuit panel viewed the evidence in the light most favorable to Brown. At App. A, 2a, the court writes: "The first sign of discord appeared in January 1995 when, shortly after assuming responsibility for the Dallas office, Rupp attended a breakfast meeting with Read [and made the "old and slow" comments]. The Fifth Circuit omits the fact that the first sign of discord was earlier, when Rupp generally ignored Read and gave a sexist explanation for why he wanted to have her attend a meeting with a female CFO, since Read was a female. (7R. App. 0122, 8 R. App. 0204)

The *Read* court ignored Read's evidence that Rupp ignored Read after he became manager of the Dallas office except for dismissing Read's testimony that Rupp refused to return her phone calls as a "conclusory [allegation]." App. A, 11a. At the same time, the Panel warped the facts concerning Rupp's rude treatment of Read by converting Read's testimony that what Rupp told a male broker who was interrupting him

during a meeting into "Rupp also yelled at a male broker." *Id.* The Panel also viewed the evidence in Brown's favor to conclude (in conclusory fashion) that the five employees Brown kept while terminating Read, whose production numbers were similar or inferior, were not similarly situated. App. A at 17a.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

No. 02-10191

DIANA L. READ,
Plaintiff-Appellant,

v.

BT ALEX BROWN INC., ETC.; *et al*,
Defendants,

BT ALEX BROWN INC., doing business
as DEUTSCHE BANC ALEX BROWN,
Defendant-Appellee.

July 30, 2003.

Appeal from the United States District Court for the
Northern District of Texas. (3:99-CV-1697-D).

Before GARWOOD, SMITH and BARKSDALE, *Circuit Judges.*

GARWOOD, *Circuit Judge.*[*]

Plaintiff-appellant Diana L. Read appeals the district court's grant of summary judgment in favor of her former employer, defendant-appellee BT Alex Brown, Inc. (Brown), on her claims of age and sex discrimination brought under

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[*] Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Title VII,[1] the Age Discrimination in Employment Act (ADEA),[2] and the Texas Labor Code.[3] Because Read has not produced evidence sufficient to create a genuine issue of material fact, we conclude that summary judgment was appropriate and affirm.

Facts and Proceedings Below

Brown, a financial management company, acting through Michael Crossley, the then manager of its Dallas office, hired Read, a female born in 1946, as an investment broker in the Private Client Division of Brown's Dallas office in April 1994. Prior to working for Brown, Read had been successfully employed as a broker with Merrill Lynch, where her performance, as measured by her "production"-an indicator comprising the gross sales commissions earned by a broker and the total customer assets under a broker's management-placed her in the top ten percent of all brokers working at Merrill Lynch. In fact, in her last year at Merrill Lynch, Read produced in excess of half a million dollars in gross sales commissions. The record thus reflects, and the parties do not dispute, that Read presented herself, and was hired by Brown, as an experienced broker, with the expectation that she would perform at Brown in a manner consistent with her prior performance at Merrill Lynch.

Shortly after Crossley hired Read, Jeff Rupp, who had participated in recruiting and hiring Read, replaced Crossley as the head of Brown's Dallas office. According to Read, her difficulties with her employer, discussed in more detail below, date from this point. The first sign of discord appeared in January 1995 when, shortly after assuming responsibility for the Dallas office, Rupp attended a breakfast

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[1] 42 U.S.C. § 2000e *et seq.*

[2] 29 U.S.C. § 623(a)(1).

[3] Tex. Labor Code Ann. § 21.001 *et seq.*

meeting with Read at which he told her that "when brokers get old, they slow down," and that although he considered Read to be "one of the old ones," he hoped that she would not begin to slow.

Her initial difficulties with Rupp notwithstanding, Read continued to work in Brown's Dallas office until her termination at the end of 1998. For a variety of reasons, however, Read's production at Brown never approached the levels that she had achieved while employed as a broker with Merrill Lynch.[4] Indeed, Read's production at Brown was not only lower than the average level of production for Brown's brokers,[5] but at no point even approached Brown's "break-even point."[6]

In the fall of 1998, Brown's then parent company, Bankers Trust, faced serious difficulties as a result of crises in the Russian and Latin American financial markets. In response, Bankers Trust directed all its subsidiaries, including Alex Brown, to retrench. To that end, Brown's Dallas office was initially instructed to submit a plan to reduce expenses by $384,000.[7] The reductions were to come from four areas: (1) communication and data services, (2) travel and entertainment expenses, (3) staff, and (4) new hires. Accordingly, Rupp submitted to Brown's Baltimore office a series of proposed expense reductions for the Dallas office, one of

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[4] Read posted her highest production numbers while working at Brown in 1997 when she produced $383,624 in sales commissions with approximately $28 million in assets under her management.

[5] The average production of Brown brokers when Read started in 1994 was $500,000. At the time of her termination in December 1998, the average had increased to over $700,000.

[6] The break-even point represents the amount of gross sales commissions that a broker needs to earn before Brown will begin to make a profit on that broker's efforts. During the period of Read's employment, the break-even point increased from $350,000 to $467,000.

[7] This target was later lowered to $274,000.

which was a proposal to terminate Read's employment. Thereafter, on December 1, 1998, Rupp discharged Read. Read, the only female broker in the Dallas office over the age of forty, was also the only broker in the Dallas office terminated in connection with the cost-savings program.

On May 25, 1999, Read filed a charge of age and sex discrimination against Brown with the Equal Employment Opportunity Commission and, after obtaining a right to sue letter, commenced the present lawsuit.

Discussion

A. *Standard of Review*

We review a district court's grant of summary judgment *de novo, Bauer v. Albemarle Corp.*, 169 F.3d 962, 966 (5th Cir. 1999), and in light of the now familiar framework announced in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986), and more recently, *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2110, 147 L.Ed.2d 105 (2000).

B. *Age and Sex Discrimination*

Title VII and the ADEA prohibit an employer from discriminating against any individual, in hiring or discharge, or in the terms and conditions of employment, on the basis of sex or age.[8] 42 U.S.C. § 2000e-2(a)(1); 29 U.S.C. § 623(a)(1). Where a plaintiff alleges discriminatory hiring or discharge, or points to a tangible employment decision

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[8] Read's discrimination claim under Texas law need not be analyzed separately. Such claims are analyzed under our Title VII precedent. *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 219 n. 10 (5th Cir.2001); *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 680 n. 1 (5th Cir.2001) (noting that "Texas courts also apply [the *McDonnell Douglas*] analysis to age discrimination cases.").

motivated by discriminatory animus, "the employment decision itself constitutes a change in the terms and conditions of employment that is actionable." *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 118 S.Ct. 2257, 2265, 141 L.Ed.2d 633 (1998). Where the plaintiff, however, cannot point to a specific tangible employment action, the conduct complained of, to constitute actionable discrimination, must be severe or pervasive. *See id.* Under either theory of discrimination, and under either Title VII or the ADEA,[9] it is the plaintiff who bears the ultimate burden of proving, by a preponderance of the evidence, that her employer intentionally discriminated against her because of her protected status. *Desert Palace, Inc. v. Costa,* ___ U.S. ___, 123 S.Ct. 2148, 2150, 156 L.Ed.2d 84 (2003); *Wallace v. Methodist Hosp. System,* 271 F.3d 212, 219 (5th Cir.2001).

"A plaintiff can prove intentional discrimination through either direct or circumstantial evidence." *Wallace*, 271 F.3d at 219. Where a plaintiff, however, can only muster circumstantial evidence that discriminatory animus played a role in an employment decision, the plaintiff may rely on the *McDonnell Douglas-Burdine*, burden-shifting framework to create a presumption of intentional discrimination. *Id.* To create such a presumption, the plaintiff must first establish a prima facie case of discrimination.[10] Thereafter, the burden of production shifts to the defendant to produce evidence that the plaintiff was dismissed for a legitimate nondiscriminatory reason. *Reeves*, 120 S.Ct. at 2106. "If the defendant

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[9] "The same evidentiary procedure for allocating burdens of production and proof applies to discrimination claims under both statutes." *Bauer v. Albemarle Corp.*, 169 F.3d 962, 966 (5th Cir. 1999).

[10] The elements of a prima facie case of discrimination are: "(1) the plaintiff was discharged; (2)[she] was qualified for the position at issue; (3)[she] was within the protected class; and (4)[she] was replaced by someone younger or outside the protected group." *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002).

succeeds in carrying its burden of production, the presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture, and the trier of fact proceeds to decide the ultimate question of whether the plaintiff has proved that the defendant intentionally discriminated against her." *Bauer v. Albemarle Corp.*, 169 F.3d 962, 966 (5th Cir. 1999). The plaintiff, thereupon, must produce substantial evidence that the defendant's nondiscriminatory reason is merely a pretext for impermissible discrimination. *Wallace*, 271 F.3d at 220. Where the plaintiff fails to produce substantial evidence of pretext, or produces evidence permitting only an indisputably tenuous inference of pretext, summary judgment in favor of the defendant is appropriate. *See West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 385 (5th Cir. 2003); *Sandstad*, 309 F.3d at 894; *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir. 1996).

We now turn our attention, in light of this analytical framework, to Read's claims of age and sex discrimination.

C. *Read's Discrimination Claims*

Read's complaint charges Brown with impermissibly discriminating against her on the basis of age and sex both in the terms and conditions of her employment, and in the termination of her employment.

1. Terms and Conditions of Employment

First, Read argues that she produced sufficient evidence to create a genuine issue of material fact regarding her claim that Brown discriminated against her in the terms and conditions of her employment.

As an initial matter, we note that it is far from clear that the conduct of which Read complains was sufficiently severe or pervasive as to constitute actionable discrimination in the terms and conditions of her employment. *See Burlington*

Indus., Inc., 118 S.Ct. at 2265. We also note that many of the alleged acts of discrimination of which Read complains may well be barred by the applicable statute of limitations.[11] Even assuming, *arguendo*, however, that Brown's treatment of Read does amount to actionable discrimination under Title VII and the ADEA, and that such conduct is not barred by limitations, we conclude that Read's claim must nevertheless fail as she cannot point to a genuine factual dispute

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[11] For cases arising in Texas, under both Tit. VII and the ADEA, the plaintiff must file a complaint with the EEOC within 300 days of the last act of alleged discrimination. 29 U.S.C. § 626(d)(2) (ADEA); 42 U.S.C. § 2000e-5(e), (e)(1) (Tit.VII). Read filed her complaint with the EEOC on May 25, 1999. Under *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061, 2071, 153 L.Ed.2d 106 (2002), where the plaintiff in a discrimination suit complains of a discrete act of discrimination, that act is barred unless the plaintiff files a charge with the EEOC within 300 days after the act occurred. Where, on the other hand, a plaintiff brings a claim of discrimination based on a hostile work environment, a court may consider "component acts of the hostile work environment [that] fall outside the statutory time period" so long as "an act contributing to the claim occurs within the filing period." *Id.* at 2074. Thus, any discrete acts of discrimination alleged by Read are barred if they occurred before July 29, 1998. Any acts that are components of Read's hostile work environment claim, however, are actionable provided that *an act* contributing to that claim occurred after July 29, 1998.

Read's complaint is devoid of any reference to specific dates. And the only discriminatory act that Read identifies in her response to Brown's motion for summary judgment is her actual termination on December 1, 1998, a discrete act that constitutes a charge of discrimination separate from Read's claim that she suffered discrimination in the terms and conditions of her employment. Read's deposition testimony, however, does contain general and undated references to what Read perceived to be rude behavior exhibited toward her by Rupp. To conclude that Read's claim of discrimination in the terms and conditions of her employment is not time barred, therefore, requires us to accept the dubious assumption, based only on the vague references in Read's deposition testimony, that Rupp's allegedly rude behavior continued after July 29, 1998. We indulge Read with this generous supposition and assume arguendo, as did the district court, that Read's claim is not proscribed.

concerning the central question of discriminatory animus. *See Reeves*, 120 S.Ct. at 2105 (noting that to impose liability under the ADEA, "the plaintiff's age must have 'actually played a role in [the employer's decisionmaking] process and had a determinative effect on the outcome.' ") (quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993)). In other words, we cannot conclude that Read has raised a genuine factual dispute concerning whether the differential terms and conditions of employment to which she was subjected were imposed because of her age or sex.

Read cites five incidents that she maintains establish that she was discriminated against in the terms and conditions of her employment with Brown. First, she alleges that she received less sales assistant support than her male or younger colleagues. Second, Read alleges that she received fewer training opportunities than male or younger brokers. Specifically, Read argues that younger brokers were sent to training workshops and were given opportunities to learn about the investment-banking business while she was not. Third, Read maintains that she was not offered certain "friends of the company" referrals,[12] while younger brokers were. Fourth, she contends that Rupp did not assist her with prospective clients but did provide such assistance to younger brokers and to male brokers. And finally, Read argues that she was subjected to rude and condescending behavior because of her age and sex.

Although this litany of Brown's alleged discriminatory behavior initially appears damning, it is evident upon closer examination that Read has failed to produce evidence

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[12] The record reflects that "friends of the company" referrals occur where a Brown broker is recommended to manage newly-issued stock offered to the officers, directors, and employees of one of Brown's corporate clients.

sufficient for any reasonable jury to conclude that the above allegedly discriminatory terms and conditions, taken singly or together, were imposed because of Read's age or sex.

Read's claim that a lack of sales assistant support suffices to prove age or sex discrimination is entirely without merit. Read shared a sales assistant with a male broker, and cannot claim, therefore, that she was treated any differently from similarly situated colleagues. Indeed, by her own admission Read was not entitled, under Brown's operating procedures, to her own sales assistant. Only a broker who produced in excess of $700,000 in commissions merited his or her own assistant. Moreover, after repeated complaints, Rupp actually assigned his own sales assistant to Read in 1997.

Read's evidence concerning training opportunities is equally unavailing. Read has adduced evidence that younger brokers received training opportunities where she did not. This fact, standing alone, however, cannot reasonably support an inference of discrimination. As noted above, Read was hired as an experienced broker. According to Read's deposition testimony, the brokers who received additional training were not experienced brokers, but were new to Brown. Absent additional evidence of discriminatory animus, it is not reasonable to infer that the newer brokers received training because they were young and male, and not because they lacked Read's level of experience. Moreover, Read introduced no evidence that she ever requested additional training opportunities which she was denied. And although there is also no evidence that the younger male brokers requested additional training opportunities, Read has produced no evidence that those brokers *did not* request such opportunities.

Similarly, Read's complaint that she was denied friends of the company referrals cannot support a claim of age or sex discrimination. Unlike the training opportunities that she did not request but nevertheless maintains she was discrim-

inatorily denied, Read does allege that she requested these referrals. She admitted, however, that she was inexperienced in the handling of such accounts. Moreover, she points to no evidence that tends to show that she was denied them because of her age or sex. On the contrary, Read can only point to one other broker in the Dallas office who did receive these types of referrals. No reasonable jury could infer from the fact that Read was denied these referrals, together with all but one of the young and male brokers in the Dallas office, that Read was the victim of impermissible age or sex discrimination in the terms or conditions of her employment.

Read's complaint that Rupp refused to assist her with developing her client base also fails to establish impermissible sex or age discrimination. Read points to the testimony of two younger, male brokers, who stated that Rupp was always willing to assist them, when they *requested* such assistance, or was willing to accompany them to meetings with investors, also when they so requested. In contrast to this testimony, Read cites three incidents where she asked Rupp to assist her with an investor but he subsequently failed to do so. Read, however, also admits that Rupp did meet with several of her clients, and that after 1996, she stopped asking Rupp for his assistance. At most, this evidence shows that Rupp was less than cooperative on three occasions in four years; it is not, however, probative of discriminatory intent.

Finally, Read alleges that Rupp treated her in a rude and condescending manner because of her age and sex. The only specific example of rude behavior that Read could recall in her deposition testimony, however, was an occasion where Rupp yelled at her when she could not locate a particular reference book. We remind Read that "Title VII is not a general civility code for the American workplace." *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 263 (5th Cir. 1999). Rather, for offensive conduct to rise to the level of actionable

discrimination, it must be sufficiently severe or pervasive so as to alter the actual terms or conditions of employment. *Wyatt v. Hunt Plywood Co., Inc.*, 297 F.3d 405, 409 (5th Cir. 2002).

However, even making the dubious assumption that Rupp's rude treatment met this high standard, we conclude that Read has failed to produce any evidence from which a reasonable jury could infer that the conduct to which she was subjected was motivated by discriminatory animus. Read admitted that Rupp also yelled at a male broker, a fact that belies her claim that Rupp's rudeness was motivated by antagonism based on her age or sex. Read did not testify, or otherwise adduce evidence, that Rupp was not similarly rude to others in the office, or that his rudeness was focused on those in a protected class. The remainder of Read's summary judgment evidence consists of the general averment that Rupp adopted a rude and condescending attitude toward her, and refused to return her phone calls. Such conclusory allegations are insufficient to defeat a properly supported motion for summary judgment. *Whelan v. Winchester Production Co.*, 319 F.3d 225, 230 (5th Cir. 2003).

It is therefore clear that none of Read's evidence, taken individually or as a whole, concerning the five examples of discriminatory terms and conditions of employment, is sufficient to establish that Brown treated Read differently because of her age or sex. Accordingly, we conclude that the district court correctly awarded summary judgment to Brown on Read's first claim of age and sex discrimination.

2. Discriminatory Discharge

Read next contends that the district court erred in granting summary judgment to Brown on her claim of discriminatory discharge. First, Read maintains that the district court erred in finding that she offered no direct evidence that Brown's decision to discharge her was discriminatory. According to

Read, the district court erroneously failed to treat three comments made by Rupp over the course of Read's four years with Brown as direct evidence of discrimination which allowed her to prevail apart from the *McDonald-Douglas-Burdine* burden shifting framework. We disagree.

Two of those comments are patently not direct evidence of discrimination. The first consists of a statement Rupp made in connection with the hiring of a new sales assistant. According to Read, in 1995 Rupp declared, "I think we need to change the psychology around here. These girls back here are not working very hard and what I'd like to do is for us to hire a young man just out of college who will . . . show these girls back here how to work." The second comment, made after Read had been discharged, was delivered in the context of Rupp's attempt to account for Read's discharge to a prospective employer. Rupp explained: "We [Brown] have very high standards here; we're like Goldman Sachs. . . . We don't hire someone like her; she doesn't fit the image. . . ."

For this purpose, direct evidence is defined in this circuit as "evidence that, if believed, proves the fact of discriminatory animus without inference or presumption." *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002). In other words, to qualify as direct evidence of discrimination, an employer's comment "must be direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that age was an impermissible factor in the decision to terminate the employee." *E.E.O.C. v. Texas Instruments Inc.*, 100 F.3d 1173, 1181 (5th Cir. 1996).[13]

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[13] In connection with her claim that the Goldman Sachs comment is direct evidence of discriminatory animus, Read also invites us to abandon this circuit's definition of direct evidence in favor of a definition announced by Judge Tjoflat of the Eleventh Circuit in *Wright v. Southland Corp.*, 187 F.3d 1287, 1288 (11th Cir. 1999). We decline this invitation for two reasons. First, this panel is without the authority to overrule the decision of another panel of this circuit. *See United States v. Taylor*, 933

Neither of these two comments, the 1995 sales-assistant comment or the Goldman Sachs comment, however, fits this definition as neither supports a claim of discrimination without the need for the drawing of an inference or the making a presumption. The first comment requires the jury to infer that Rupp wanted to hire a young man out of college because of his sex, and not simply because Rupp believed that a recent college graduate would tend to work harder. Even if such an inference were reasonable, it is nonetheless a necessary one if the statement is to be accepted as evidence of discriminatory intent. The sales-assistant comment, therefore, cannot qualify as direct (or meaningfully probative) evidence.

The Goldman Sachs comment also does not constitute direct evidence of discrimination. Indeed, as Read admits, to conclude that this comment evinces discriminatory intent requires the jury to assume that Goldman Sachs tends not to hire women, a fact for which Read offers no evidence aside from her own unsupported, conclusory assertion that Goldman Sachs is known for not hiring women. Accordingly, the district court did not err in refusing to treat either of these comments as direct (or otherwise meaningfully probative) evidence of discrimination in Read's termination.

F.2d 307, 313 (5th Cir. 1991). Second, that portion of Judge Tjoflat's decision in *Wright* announcing Read's proposed definition of direct evidence is dictum and was not joined by the other two judges on the *Wright* panel. *See Wright*, 187 F.3d at 1306 (Judges Cox and Hull concurring in the judgment and result, respectively).

In any event, the result here would clearly be the same even absent the direct/circumstantial evidence distinction (or our court's definition of those terms for this purpose), for the three comments in question, taken together, are simply insufficiently probative of discriminatory intent in respect to Read's December 1998 termination, particularly in light of Brown's undisputed evidence of its nondiscriminatory reason for Read's termination. Nothing in our affirmance here is inconsistent with the result in *Wright*.

Finally, Read points to a third comment, namely Rupp's 1995 comment to Read that brokers tend to slow as they age. This remark, unlike the other two, may arguably fall within the definition of direct evidence of discrimination. However, given this comment's vintage, as well as Read's failure to identify any other like comments in the course of her four-year tenure with Brown, we cannot view this statement as anything more than a stray remark. It, considered in isolation or together with the other remarks, is simply not meaningfully probative of discriminatory animus in Read's termination.

Mere stray remarks, however distasteful, do not demonstrate discriminatory animus. *E.E.O.C. v. Texas Instruments Inc.*, 100 F.3d 1173, 1181 (5th Cir. 1996). Rather, "for comments in the workplace to provide sufficient evidence of discrimination, they must be '1) related [to the protected class of persons of which the plaintiff is a member]; 2) proximate in time to the terminations; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue.'" *Krystek v. Univ. of S. Miss.*, 164 F.3d 251, 256 (5th Cir. 1999) (quoting *Brown v. CSC Logic Inc.*, 82 F.3d 651, 655 (5th Cir. 1996)); *see also Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 405 (5th Cir. 2001) (noting that "this court already has interpreted Reeves not to overrule our stray remarks jurisprudence, at least where the plaintiff has failed to produce substantial evidence of pretext."). Rupp's comment, although not related to sex, was related to age. Rupp was also an individual with authority over Read's continued employment. The comment, however, was made at the beginning of Read's tenure with Brown, and almost three years prior to her termination. As the district court concluded, therefore, this comment cannot be viewed as proximate in time to the challenged employment decision, and cannot therefore be considered as meaningfully probative evidence that Read's termination was discriminatory.

Having concluded that Read failed to produce adequate direct evidence of discrimination, the district court correctly analyzed Read's claim under the *McDonnell Douglas-Burdine,* burden-shifting framework sketched above. *See infra* Part II(B). Read's final arguments on appeal, therefore, challenge the district court's application of that framework to her claim.

It is undisputed that Read established the elements of a prima facie case of age and sex discrimination. It is also clear that Brown satisfied its burden of production, relying on affidavits and depositions to produce a legitimate, nondiscriminatory reason for Brown's discharge. Whether the district court's grant of summary judgment was in error, therefore, turns on whether Read introduced the requisite substantial evidence, direct or circumstantial, that such justification was pretextual. We conclude that she did not, and that summary judgement therefore was appropriate.

Brown maintains that Read was selected for termination, based on her performance as a broker, in connection with a wider effort to reduce costs. In an effort to show that this proffered reason was merely a pretext for impermissible discrimination, Read argues that Brown both offered inconsistent explanations for her termination, and retained male and younger brokers with production levels lower than hers.

An inconsistent reason offered to explain an employee's termination may support a finding that the reason is mere pretext. *See Reeves*, 120 S.Ct. at 2108 ("In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose."); *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1167 (6th Cir. 1996) ("An employer's changing rationale for making an adverse employment decision can be evidence of pretext."). The record, however, does not reveal any inconsistency in Brown's explanations for discharging Read.

Read argues that both Rupp and Tim Schweizer, Rupp's supervisor in Brown's Baltimore office, initially told her that the reason for her termination was her failure to reach the $467,000 break-even point for 1998, while Brown's position in the present litigation is that Read was selected for discharge based on her overall performance. In support of this argument, Read cites the following portion of her deposition testimony:

> "A: We sat down. The very first thing [Rupp] said, he said, we're doing some cost cutting and you and I are going to have to part company.
>
> Q: Okay.
>
> A: And I said, Well if you're doing cost cutting, why would you fire me if I'm bringing in 400,000? And [Rupp] said, the cutoff is 467 and you're not doing 467."

This testimony, however, does not establish that Brown terminated Read for failing to reach $467,000 in production, nor does it therefore establish that Brown dissembled or changed its reason for discharging Read from a failure to reach a particular production number to a general failure to perform. On the contrary, it serves to support Brown's position that it did not base its decision to discharge Read solely on production numbers, and that it instead raised the issue of the $467,000 production figure only in response to Read's implicit protestation that she should not be discharged because she was producing a profit for the firm.

That Read was not discharged only for failing to reach the $467,000 break-even point also undermines her reliance on evidence that Brown retained other brokers who had not posted gross commissions in excess of $467,000. Brown did retain five brokers with production numbers below $467,000. *See Ramirez v. Landry's Seafood Inn & Oyster Bar*, 280 F.3d 576, 577 (5th Cir. 2002) (noting that a presumption of discrimination is raised where an employer treats similarly

situated employees differently under circumstances that are essentially identical). Read, however, has not refuted Brown's evidence that these five employees were not similarly situated. Brown produced evidence that one of the brokers retained was a part of a profitable team of brokers that specialized in serving clients in Mexico. Another was an older broker who was in the process of transferring his clients to other brokers in anticipation of retirement. The remaining three were all inexperienced brokers who had worked for Brown as brokers for less than a year. Indeed, Read failed to produce any evidence showing that any of these remaining five brokers was similarly situated. We cannot, therefore, conclude that the district court erred in finding that Read was unable to establish that Brown's proffered reason for selecting her for termination was pretextual.

Finally, Read advances the alternative argument that if Brown did not discharge her because of a production threshold, then the decision to discharge her must have been subjective, and that summary judgment was not, therefore, appropriate. *See Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 681 (5th Cir. 2001) (noting that "it is inappropriate to decide as a matter of law that an employee is unqualified because he has failed to meet entirely subjective hiring criteria."). *Medina v. Ramsey Steel Co.*, however, is inapposite here. The reasons cited by Brown for Read's discharge are not primarily subjective. Read never achieved at Brown that same level of production that she had attained at Merrill Lynch. Indeed, she never met Brown's break- even point, let alone the nationwide average production level of brokers at Brown.

Upon reviewing Brown's motion for summary judgment *de novo,* we conclude that the district court correctly awarded summary judgment to Brown both on Read's claim of discrimination in the terms and conditions of her employment and on her claim of discriminatory discharge. Read has not

made the requisite showing that Brown's explanation for her termination was false, *see Reeves*, 120 S.Ct. at 2107, and has failed to produce sufficient evidence from which a reasonable jury could conclude that Brown intentionally discriminated against her on the basis of either her age, her sex, or a combination of those two traits.

D. *Motion to Alter or Amend the Judgment*

In her final point of error, Read argues that the district court erred in denying her Rule 59 motion to alter or amend the judgment. We generally review a decision on a motion to alter or amend judgment under Rule 59(e) for an abuse of discretion. *Fletcher v. Apfel*, 210 F.3d 510, 512 (5th Cir. 2000). To the extent that a ruling on a Rule 59 motion is a reconsideration of a question of law, however, the standard of review is *de novo*. *Tyler v. Union Oil Co.*, 304 F.3d 379, 405 (5th Cir. 2002).

Read's Rule 59 motion did not seek to "correct manifest errors of law or fact or to present newly discovered evidence," *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989), but instead simply challenged the district court's application of the standard for granting summary judgment.[14] Since, in our *de novo* review of the summary

[14] The district court denied Read's Rule 59 motion on the grounds that she attempted to rely on new evidence not made a part of the original summary judgment record, without having demonstrated sufficient reason for her failure to introduce that evidence originally. Read, however, points out that the evidence appended to her Rule 59 motion was not new evidence, but consisted only of testimony that had been redacted from the depositions that she had earlier introduced in support of her memorandum in opposition to summary judgment. According to Read, she appended this formerly redacted material in order to place in its appropriate context the summary judgment evidence that the district court had already reviewed. Read does not appeal the district court's refusal to consider this additional material as part of the summary judgment record. Rather, her only argument on appeal is that the district court misapplied the standard for granting summary judgment.

judgment evidence, we find no error in the district court's grant of summary judgment to Brown, we likewise find no error in the district court's denial of Read's Rule 59 motion.

Conclusion

Because we conclude that Read cannot point to any evidence in the record sufficient to raise a genuine issue of material fact concerning any discriminatory motive for her termination, we conclude that the district court properly awarded summary judgment to Brown. The district court's judgment is, accordingly, AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

[Filed Aug 28, 2003]

No. 02-10191

DIANA L. READ,
Plaintiff-Appellant,

v.

BT ALEX BROWN INC., ETC.; *et al*,
Defendants,

BT ALEX BROWN INC., doing business
as DEUTSCHE BANC ALEX BROWN,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Texas, Dallas

ON PETITION FOR REHEARING EN BANC

(Opinion 7/30/03, 5 Cir., _____, _____, F.3d_____)

Before GARWOOD, SMITH and BARKSDALE, *Circuit Judges*.

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [GARWOOD]
United States Circuit Judge

APPENDIX C

29 U.S.C. § 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

APPENDIX D

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Supreme Court, U.S.
FILED

(2)

NOV 26 2003

No. 03-826

IN THE

Supreme Court of the United States

DIANA L. READ,

Petitioner,

v.

ALEX BROWN, *et al.*.

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL APPENDIX

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APPENDIX

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF TEXAS,
DALLAS DIVISION

No. Civ.A. 3:99-CV-1697-.

DIANA L. READ,
Plaintiff,

v.

BT ALEX. BROWN INCORPORATED,
d/b/a Deutsche Banc Alex. Brown,
Defendant.

Jan. 7, 2002

MEMORANDUM OPINION AND ORDER

FITZWATER, J.

Plaintiff Diana Read ("Read") sues defendant BT Alex. Brown, Inc. d/b/a Deutsche Banc Alex. Brown ("Brown") alleging that Brown discriminated against her, and ultimately terminated her employment, based on her age and sex. Brown moves for summary judgment, contending *inter alia* that it did not discriminate against her and that it discharged her as part of a reduction in force ("RIF").[1] The court grants

[1] Brown also moves to exclude certain expert testimony of J. Herbert Burkman, Ph.D. ("Dr.Burkman") relating to damages. Read moves to exclude expert testimony of Helen Reynolds, Ph.D. ("Dr.Reynolds") and John Maine ("Maine"). Because the testimony of Drs. Burkman and Reynolds relates solely to damages, and the court is granting Brown's motion for summary judgment without reaching the damages question, the court denies the motions as moot. Maine's testimony relates primarily to damages, but also contains an opinion regarding the propriety, as a business matter, of Read's termination. The court has not considered

Brown's motion for the reasons that follow and dismisses this case with prejudice.

I

Brown hired Read as a broker in 1994. She had previously worked in a similar capacity at Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), but Merrill Lynch had discharged her. As part of the hiring process, Read interviewed with Jeff Rupp ("Rupp"), the Sales Manager for Brown's Dallas office, and Michael Crossley ("Crossley"), the Dallas Office Manager. Read informed them that she believed Merrill Lynch had discriminated against her based on her age and sex.[2] Brown hired her as a broker, and she commenced her employment in April 1994. Rupp became the Dallas Office Manager in 1995. Read continued working as a broker until Brown terminated her employment on December 1, 1998 (effective December 31, 1998) as part of a company-wide RIF triggered by a financial crisis at Brown's then-parent company, Banker's Trust.

Read alleges that, while employed at Brown, she was "subjected to differential terms and conditions of employment than male and/or younger employees." P. Compl. at ¶ 7. She also maintains that Brown terminated her employment "because she was a female and/or because of her age and her termination was a part of defendant's pattern and practice of treating females and/or older employees differently and more negatively than male and/or younger employees." *Id.* at ¶ 8.

Maine's testimony in deciding Brown's motion and therefore denies as moot Read's motion to disqualify Maine.

[2] Read sued Merrill Lynch in 1994. *See Read v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Civil Action No. 3:94-CV-1072-T (Maloney, J.). The parties resolved the suit through arbitration, and the case was dismissed on October 23, 1997.

Read filed the instant suit alleging sex discrimination, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e *et seq.*, and/or the Texas Commission on Human Rights Act ("TCHRA"), *Tex. Labor Code Ann.* §§ 21.001-21.405 (West 1996 & Supp.2002), and age discrimination, in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.*, and/or the TCHRA.

II

The court first considers whether Brown is entitled to summary judgment on Read's claims of having been subjected to "differential terms and conditions" during her employment.

In her brief and in answer to Brown's interrogatories, Read identifies five acts that she maintains constitute differential terms and conditions of employment. She alleges that she (1) received less sales assistant coverage than did male and/or younger employees, (2) was offered less access to training programs than were male and/or younger employees, (3) received fewer corporate assignments than did male and/or younger employees, (4) received little to no help with prospects, while such help was given to male and/or younger employees, and (5) was subjected by Rupp to rude and condescending treatment. *See* P. Br. at 5-9; D.App. 188-89. Even if the court assumes *arguendo* that the claims she bases on this alleged conduct are timely,[3] her allegations are not

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[3] Brown contends these claims are time-barred because Read did not file a timely discrimination charge. The court will assume *arguendo*, for purposes of applying the statute of limitations, that Brown's alleged course of discriminatory conduct constitutes a continuing violation and will treat as timely the claims that stem from the alleged differential terms and conditions of employment because they were made the subject of a charge of discrimination filed with the Equal Employment Opportunity Commission within 300 days of Read's termination. *See* D.App. 185.

supported by sufficient evidence to enable a reasonable trier of fact to find that Brown intentionally discriminated against her.[4]

Concerning her claim that she received less sales assistant coverage than did male and/or younger employees, the evidence would only reasonably permit the finding that the sales assistant assigned to Read during the first period complained of was assigned to three or four other brokers, all of whom were male, and at least one of whom was over age 40 at the time, and at least one of whom was under age 40. *See id.* at 53-54. The evidence also indicates that this situation persisted for less than one year of the four-year period that Read was employed at Brown. *See id.* at 53-56. Read's complaint relating to inadequate sales assistant coverage during a second period of time stems from having been assigned to share a sales assistant with a single male broker, who was over age 40 at the time. *See id.* at 56-57. Read admits that during this period her production levels did not entitle her, under firm policy, to her own sales assistant. *See id.* at 30. The evidence indicates that Read's objections to the adequacy of her sales assistant coverage ended in 1997, when Rupp assigned his own sales assistant to Read. *See id.* at 60-61. Taken as a whole, this evidence is insufficient to enable a

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[4] Brown also argues that none of these different terms and conditions of employment is an adverse employment action. *See* D. Br. at 15. Brown cites *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), for the definition of "adverse employment action." But *Burlington* is a case in which the Supreme Court defined "adverse employment action" in order to decide when an employer is vicariously liable for the sexually harassing conduct of an employee. *See id.* at 753-54. Title VII and the ADEA each prohibit discrimination against an individual "with respect to [her] . . . terms, conditions, or privileges of employment[.]" The concept of term, condition, or privilege of employment is not the equivalent of "adverse employment action," as Brown uses the terms.

reasonable trier of fact to find that the decisions relating to Read's sales assistant coverage were motivated by discriminatory animus based on age or sex.

Read also alleges that, based on her age or sex, she was less frequently given access to training programs than were male and/or younger employees. *See* P. Br. at 8. Read relies on her own deposition testimony that she recalled that Rupp sent two newly-hired younger male brokers to participate in a workshop at the Wharton School of Business relating to brokerage software. *See* P.App. 129-32. Read also cites her deposition testimony that another male broker attended a similar workshop. *See id.* at 132. Although this evidence indicates Read's desire, in retrospect, to have attended such programs, *see id.*, she has adduced no proof that she ever asked, or was denied the opportunity, to attend any training seminar or program. This proof is inadequate to enable a reasonable trier of fact to find that the decisions relating to Read's participation in training programs or beta testing of new products were motivated by discriminatory animus based on either age or sex.

In support of her contention that she received fewer corporate assignments than did male and/or younger employees, Read cites her deposition testimony that Rupp made an effort to educate younger brokers about how to bring corporate investment banking clients to the firm. *See* P.App. 107-08. She relies as evidence of differential treatment on the fact that Rupp accompanied Lynda Villareal ("Villareal"), a younger female broker, on trips to see investment banking clients. *See id.* Read also asserts that Rupp more frequently gave "friends of the company" referrals to younger and/or male brokers. *See* P. Br. at 8. Her testimony specifically identifies only a single broker named Landers, a male over age 40, as an employee who received such referrals. *See* D.App. 108- 09. Read also relies on evidence that Rupp attended client meetings outside the office with two male

brokers. *See* P.App. 15-16, 40. She avers in her deposition that Rupp only once accompanied her on a prospecting trip outside the office. *See id.* at 100-01. She asserts that when Rupp did meet with her prospective clients, the meetings were typically held at Brown's office. *See id.* This evidence relating to these specific instances of Rupp's allegedly preferential business support of younger and/or male brokers would not permit a reasonable trier of fact to find that Rupp's actions were motivated by an intent to discriminate on the basis of age or sex.

Read contends that Rupp "treated younger and male brokers with more respect than he treated Read." P. Br. at 9. In support of this contention, Read relies on her own account of two incidents over the course of her employment at Brown. The first instance in which Read alleges that Rupp was "rude and condescending" in public occurred at a weekly meeting. Read alleges that, in response to a question she asked, "[Rupp] just acted like I should have known that and that was dumb for me to even ask that question." P.App. 123. The second incident occurred when Read was searching for a venture capital book, and Rupp allegedly yelled at her during her attempt to locate it. *See* D.App. 98-99. Read also offers testimony that two male brokers reported that Rupp was never rude to them in public. *See* P.App. 20, 43. This evidence is insufficient to permit a reasonable trier of fact to find that Rupp's behavior was motivated by discriminatory intent based on Read's age or sex.

After considering each of plaintiff's allegations relating to differential terms and conditions of employment, separately and as a whole, the court holds that a reasonable trier of fact could not find that Brown intentionally discriminated against Read based on her age or sex. The court therefore grants Brown's motion for summary judgment on these claims.

III

Read also alleges that Brown terminated her employment based on her sex or age.

A

Read contends she has direct evidence of unlawful discrimination. She relies on three comments that Rupp allegedly made over a three-year period as direct evidence of discriminatory intent sufficient to raise a genuine issue of material fact that precludes summary judgment.

Read asserts that Rupp made the first of these comments during a 1995 breakfast meeting with her. According to Read's deposition, the substance of the comment was as follows:

> [Rupp said] "when brokers get old, they slow down, or you know, when brokers get older, they slow down. And then the next thing he said was you know, even though you're one of the old ones, I-oh, he said-okay. There was another broker in the office, oh God, what was his-oh, Jim Sale, he said, Jim is old but he's not slow. And he said, so I've really, either he said hoping or anticipating that even though you're older, you're not going to be slow.

D.App. 64-65.

Read contends that Rupp made the second comment in the context of deciding who should be hired as her sales assistant. According to Read's deposition testimony, Rupp stated, in reference to the need to hire a new sales assistant:

> I think we need to change to the psychology around here. These girls back here are not working very hard and what I'd like to do is for us to hire a young man just out of college who will work his-I don't know what he said, buns off or work himself to death, work all kinds of hours and show these girls back here how to work.

D.App. 106.

The third comment on which Read relies to establish discriminatory intent is one alleged to have taken place after her termination, during a telephone call that Rupp placed to a prospective employer of Read's to clarify why Brown terminated Read. According to Read's deposition testimony:

> Jeff talked to the Oppenheimer manager, and the Oppenheimer manager asked Jeff why would you be terminating someone that does this much production, that does this much-has this much in assets[.] [ ] And Jeff said, We have very high standards here; we're like Goldman Sachs; you know, we just-I can't remember specifically how it was said. We don't hire someone like her; she doesn't fit the image and some other manager wouldn't know what my business plan is.

D.App. 102. Read maintains that this comment demonstrates sex bias on the part of Rupp because "Goldman Sachs is pretty much known for not hiring women." D.App. 105.

Brown urges that these three comments constitute "stray remarks" that do not permit a reasonable inference of discrimination. Under Fifth Circuit precedent that has been reaffirmed subsequent to the Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), these remarks are evaluated in the summary judgment context according to the following standard:

> [F]or comments in the workplace to provide sufficient evidence of discrimination, they must be 1) related [to the protected class of persons of which the plaintiff is a member]; 2) proximate in time to the terminations; 3) made by an individual with authority over the employment decision at issue; and 4) related to the employment decision at issue.

Auguster v. Vermillion Parish Sch. Bd., 249 F.3d 400, 405 (5th Cir. 2001) (internal quotation marks deleted) (quoting *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 655 (5th Cir. 1996));

accord Rubinstein v. Adm'rs of the Tulane Educ. Fund, 218 F.3d 392, 400-01 (5th Cir. 2000) (similarly reaffirming *Brown* stray remarks doctrine in post-*Reeves* case). Stray remarks are insufficient to enable a claim to survive summary judgment when a plaintiff fails to produce substantial evidence of pretext. *See Auguster*, 249 F.3d at 404-05.

Viewing the evidence in the light most favorable to Read as the summary judgment nonmovant, the court holds that the first comment-concerning older brokers becoming "slow"—was related to the protected class of persons of which Read is a member and was made by an individual with authority over the employment decision at issue. Even if the court assumes that this remark in fact concerned the employment decision at issue (Read's termination), the comment was made in 1995, at the beginning of an employment relationship that did not end until December 1998. Therefore, it was not made proximate in time to her termination and must be regarded as a stray remark that does raise a genuine issue of material fact regarding discriminatory intent.

The second comment relates to the hiring of a sales assistant for Read. This remark is insufficiently related to Read's termination to raise a genuine issue of material fact regarding Rupp's discriminatory intent in effecting her discharge. Moreover, this comment is not alleged to have been made at a time proximate to the decision to terminate her employment.

The third comment, that Brown is "like Goldman Sachs," was proximate to the termination decision, was alleged to have been made by the person responsible for Read's discharge, and was intended to be an explanation of-and therefore is "related to"-the firing. But the only evidence that Read offers to support her contention that the comment was related to the protected class of persons of which she is a member is her own testimony that "Goldman Sachs is pretty much known for not hiring women." D.App. 105. Read's

subjective belief regarding how Rupp's comment should be interpreted is insufficient to permit the finding that the remark was related to women. *See Elliott v. Group Med. & Surgical Serv.*, 714 F.2d 556, 564 (5th Cir. 1983). This is particularly so given the plausible and well-supported alternative interpretations of this remark that Brown advances. *See* D.App. 140, 210 (noting similarities between brokerage business plans of Brown and Goldman Sachs and indicating that Brown frequently compared its business model to that of Goldman Sachs).

B

1

Because the comments that Read cites do not constitute sufficient direct evidence of intent to discriminate on the basis of sex or age, she must rely on the familiar burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Read must first establish a prima facie case of discrimination. *See Pratt v. City of Houston*, 247 F.3d 601, 606 (5th Cir.2001) (citing *McDonnell Douglas*, 411 U.S. at 802-04). Once Read meets this burden, Brown is obligated to articulate a legitimate, nondiscriminatory reason for the employment decision at issue. *See Reeves*, 530 U.S. at 142. This is a burden of production, not persuasion. *Id.* Once Brown meets this production burden, the presumption of discrimination disappears. *Id.* Read must then prove by a preponderance of the evidence that the legitimate reason offered is not the true reason but is a pretext for discrimination. *Id.* "[T]he plaintiff may attempt to establish that [she] was the victim of intentional discrimination 'by showing that the employer's proffered explanation is unworthy of credence.'" *Id.* (quoting *Tex. Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981)). "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude

that the employer unlawfully discriminated." *Id.* at 148. "[I]t is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." *Id.* at 147. "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Id.* At the summary judgment stage, Read need only raise a genuine issue of material fact. *See Tutton v. Garland Indep. Sch. Dist.*, 733 F.Supp. 1113, 1116 (N.D.Tex.1990) (Fitzwater, J.).

2

The court must initially decide whether Read has established a prima facie case. The first three elements of the prima facie case for Title VII and ADEA claims are the same. She must prove that she (1) belongs to the protected category, (2) was qualified for the position she held, and (3) was discharged. *See Meinecke v. H & R Block of Houston*, 66 F.3d 77, 83 (5th Cir. 1995). In a RIF case, the fourth element she must prove to establish a Title VII prima facie case is that "after [the] discharge others who were not members of the protected class remained in similar positions. *Id.* (citing *Vaughn v. Edel*, 918 F.2d 517, 521 (5th Cir. 1990) (internal quotation marks omitted)). The fourth element in a RIF case under the ADEA is that she was "otherwise discharged because of [her] age." *Id.* (citing *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993)).

The first three elements of her Title VII prima facie case are undisputed. Concerning the fourth element, the record contains uncontested evidence that after the discharge, others who were not members of the protected class (*i.e.*, men) remained in similar positions. *See* D.App. 205-06. Similarly, the first three elements of Read's prima facie case under the

ADEA are undisputed and are adequately established by the record. With respect to the fourth, the Fifth Circuit has noted:

> Although we require more than a conclusory allegation of age discrimination to establish a prima facie case, we do not require much more. Generally, we demand only that a plaintiff present some evidence of differential treatment between older and younger employees.

Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 645 (5th Cir. 1985) (internal citations omitted). Thus Read may establish a prima facie case of age discrimination merely by showing that "[she was] discharged, while other younger [brokers] remained on the payroll." *EEOC v. Tex. Instruments, Inc.*, 100 F.3d 1173, 1180 (5th Cir. 1996). The undisputed evidence demonstrates that Read has satisfied this requirement and therefore has established a prima facie case under the ADEA. *See* D.App. 205-06.

3

Brown has met its burden of production by adducing substantial evidence that it terminated Read as part of a RIF in response to adverse business conditions suffered during the latter part of 1998. The evidence indicates that in late 1998, Brown's then-parent company, Banker's Trust, experienced a severe financial crisis. *See* D.App. 211, 150. In response, senior management issued directives requiring cost-cutting within Banker's Trust and its subsidiaries, including the Brown Private Client Services Division. *See id.* at 145. Having received a target cost-reduction amount. Tim Schweizer ("Schweizer"), head of the Private Client Services Division, instructed the Branch Managers under his supervision, including Rupp, to reduce expenses. *See id.* at 145, 177. At about 6:00 p.m. on November 18, 1998, Rupp received an e-mail that communicated the reduction directive for the Dallas office. *See id* . at 220, 212. He was instructed to reduce expenses for his branch by $384,000, allocating

expense cuts among four categories, by 8:30 a.m. on November 20, 1998. *Id.* Brown has introduced evidence that shows that, under this reduction directive, it selected Read for termination based on her overall performance. *See id.* at 212. Its proof also shows that it terminated and retained brokers who were both older and younger than age 40 and kept the only other female broker employed in the office. *See id.* at 205-06.

A RIF is a legitimate, nondiscriminatory reason for discharge. *See Tex. Instruments*, 100 F.3d at 1181. In the RIF context, therefore, "the fact that an employee is qualified for [her] job is less relevant-some employees may have to be let go despite competent performance." *Id.* (citing *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 124 (5th Cir. 1996)). An employee challenging the termination on the grounds of unlawful discrimination may still raise a genuine issue of material fact, however, upon a showing that she was terminated in favor of "clearly less qualified individuals" outside the protected class. *Id.*

Brown has produced ample proof that details and supports its stated rationale for selecting Read as a broker to be terminated. *See* D. Br. at 6-11. The evidence indicates that Read was extended an offer of employment with Brown at the conclusion of an interview process that included both an interview with Rupp and disclosure of Read's belief that she had been discriminated against by her previous employer, Merrill Lynch. *See* D.App. 24-27, 142. Among the factors that motivated Brown's decision to hire Read was the expectation that she would continue to produce commission revenue at a level similar to that which she had generated at Merrill Lynch. *See id.* at 15-16. During the course of her employment at Brown, Read never reached the level of production she had attained in her final year at Merrill Lynch, nor did she at any time during her tenure at Brown attain management's stated production goals. *See* D.App. 21, 211.

She consistently performed in the bottom half, if not bottom quartile, of brokers. *Id.* at 211. Moreover, Read's production consistently failed to rise above the "break-even" point below which management estimated that retention of a broker cost, rather than made, the firm money. *See id* at 211, 49. The evidence indicates that the "break-even" level applicable during the year 1998 was communicated to Read specifically and to brokers in the Dallas office as a group. *See* D.App. 168-69, 48-49.

The summary judgment record also indicates that Brown's parent company, Banker's Trust, experienced a severe financial crisis in late 1998. It is uncontested that in response to this crisis, Rupp received a directive from Jean H. Tighe, a Principal in the Private Client Division, to reduce costs at the Dallas office. *See id.* at 220, 212. The evidence reflects that Rupp, working within a schedule that required submission of his cost reduction proposal in fewer than two business days, formulated a plan to achieve the mandated cost reductions that included a reduction in travel and entertainment expenses, the solicitation of volunteers for early retirement, elimination of two projected hires for 1999, elimination of a Bloomberg information terminal, a reduction in communication costs, the transfer of a sales assistant to a receptionist position, and the termination of Read's employment. *See id.* at 213, 222. The other female broker employed in Brown's Dallas office, Villareal, was retained. *See id.* at 212.

4

Read attempts to offer proof that Brown's proffered reason for the termination was pretextual based on several arguments that would require the finder of fact to infer discriminatory intent.

First, Read advances each of the "differential terms and conditions of employment" to which Rupp allegedly subjected her, *see supra* at § II, as evidence that the termination

decision was similarly motivated by discriminatory intent. Because the court has already held that there is no genuine issue of material fact regarding a discriminatory animus for the acts themselves, this conduct is insufficient to raise a genuine issue of material fact regarding the alleged discriminatory motives behind the termination.

Second, Read asserts that inconsistencies in Brown's expression of the justification for the termination raise a genuine issue of material fact regarding pretext. *See* P. Br. at 32-34. In Brown's answers to plaintiff's first set of interrogatories, it articulates the reasons for Read's termination:

> *Interrogatory No. 1:*
>
> > Please state the exact reason(s) Defendants made the decision to terminate Plaintiff's employment.
>
> *Answer:*
>
> > As part of a national expense management reduction process within Banker's Trust and its subsidiaries, the Private Client Division in the Dallas office was required to reduce its expenses. Plaintiff's employment was terminated as a part of this process due to her performance.

P.App. 229. This explanation comports precisely with Rupp's deposition testimony concerning the reasons for the termination, *see id.* at 150-51, and with Read's own account of the explanation offered by Rupp at the time he informed her of the termination, *see id.* at 136. The fact that the U-5 form that Brown was required to file with the Securities and Exchange Commission upon Read's termination stated only that Read was "downstaffed," or that the deposition testimony of Schweizer, a person whom plaintiff admits was not responsible for the termination decision, *see* P. Br. 27, emphasized Read's lack of performance as the reason for the termination, would not allow a reasonable trier of fact to find that Brown's

proffered explanation was pretextual. Therefore, viewing the evidence in the light most favorable to Read as the nonmovant, the court discerns no inconsistency in the articulated reasons that is sufficient to create a genuine fact issue, and it holds that the purported inconsistencies are insufficient to preclude summary judgment.

Third, plaintiff urges that pretext may be found in "[Brown's] inability to establish a decision-making timeline." *Id.* at 34. Viewing the evidence in the light most favorable to Read as the nonmovant, the court discerns no inconsistency between Rupp's account of when the decision to terminate Read was made, *see* P.App. 166 (stating that the cost savings from terminating Read were introduced into the Dallas Office's cost reduction proposal sometime between Rupp's initial formulation of ideas on November 18, 1998 and the sending of the final proposal on November 20, 1998), and that of Mary Hogan ("Hogan"), *see id.* at 26-27 (reproducing Hogan's testimony that, in her capacity as Office Administrator, she suggested Read's termination during a late-night meeting with Rupp on November 18, 1998). Therefore, no reasonable inference of pretext can be drawn based on that contention. Given this factual background, Read's evidence that the e-mail communicating the cost reduction proposal was sent to the Baltimore office three-and-a-half hours after the requested time for submitting such proposals, *see id.* at 216, 223, would not permit a reasonable finder of fact to find pretext.

In conjunction with plaintiff's attempts to adduce specific evidence that Brown's stated reasons are pretextual, Read advances the general contention that summary judgment is improper because a jury must be allowed to judge the credibility of the employer's proffered reasons for termination where those reasons rest upon any degree of subjective judgment of performance. *See* P. Br. at 33-34. The court disagrees. In *Medina v. Ramsey Steel Co.*, 238 F. 3d 674, 681

(5th Cir. 2001), the Fifth Circuit held that where the defendant's proffered justification for an adverse employment decision was based *entirely* on subjective criteria, plaintiff's alleged failure to meet these entirely subjective criteria may not be considered sufficient as a matter of law to defeat plaintiff's prima facie case. Here, Read established a prima facie case. Under the *McDonnell Douglas* burden shifting framework, once Brown produced evidence of a legitimate, nondiscriminatory reason for the employment decision at issue, the burden shifted to Read to prove by a preponderance of the evidence that the legitimate reason offered was not the true reason but was a pretext for discrimination. *See Reeves*, 530 U.S. at 142. Because the measures of performance that Brown relies on to justify Read's termination are to a large degree quantifiable and therefore not entirely subjective, evaluation of its proffered justification does not rest purely on the testimonial credibility of the employer. *Cf. Lindsey v. Prive Corp.*, 987 F.2d 324, 326 (5th Cir. 1993) (reversing summary judgment based on plaintiff's failure to establish prima facie case under ADEA where plaintiff was denied promotion to position of dancer based on employer's proffered reason that she was not "beautiful, gorgeous, and sophisticated"). Summary judgment is therefore proper if the evidence that plaintiff presents does not raise a genuine issue of material fact regarding pretext [5] and, taken as a whole, would not enable a reasonable trier of fact to find intentional discrimination.

5

In order to find from the evidence that Read has adduced that her age and/or sex was a motivating factor in Brown's decision to terminate her, a jury would be required to con-

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[5] The court will treat the arguments that Read advances under the heading "Reasons Given [by Brown] Are Not Credible," *see* P. Br. at 35-36, as efforts to adduce evidence of pretext.

clude that, after hiring her in 1994 with knowledge of her sex and age, Brown decided in 1998 to terminate her based on one or both factors. It would be necessary for the jury to find that Brown used the financial crisis that Banker's Trust experienced in late 1998, and the consequent cost-cutting directives that required immediate implementation by local management, as an artifice for putting into action a discriminatory intent against Read. In the face of evidence that Read's performance had for several years fallen below established standards, the jury would have to conclude that her performance was not the real reason Brown selected Read for termination under the RIF. The evidentiary support for this inference would stem only from (1) three comments made sporadically during the more than four- year course of Read's employment,[6] (2) allegedly different terms and conditions of employment that are themselves unaccompanied by evidence of discriminatory intent, and (3) testimony and documents that fail to establish an inconsistency in Brown's articulation of its reason for the termination. Because it would be unreasonable to find intentional discrimination or pretext based on this evidence, summary judgment is warranted.

IV

Because Texas state courts construe the TCHRA consistently with federal law interpreting Title VII and the ADEA, the court grants Brown's motion for summary judgment on Read's state law causes of action, as well. *See Shackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 404 n. 2 (5th Cir. 1999) ("the law governing claims under the TCHRA and

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[6] Although the court has held above that the three comments cited are insufficient direct evidence of discrimination, *see supra* at § III(A), the court still weighs these comments in making its determination regarding the sufficiency of the evidence relating to pretext. Where, however, as here, plaintiff has failed to produce substantial evidence of pretext, these stray remarks are insufficient to defeat the motion for summary judgment. *See Auguster*, 249 F.3d at 404-05.

Title VII is identical"); *Caballero v. Cent. Power & Light Co.*, 858 S.W.2d 359, 361 (Tex. 1993) ("Another stated purpose [of the TCHRA] is to coordinate and conform with federal law under Title VII of the Civil Rights Act of 1964, as amended, and the Age Discrimination in Employment Act." (internal citations omitted)).

* * *

Brown's motion for summary judgment is granted, and this action is dismissed with prejudice by judgment filed today.

SO ORDERED.

(3)

No. 03-826

Supreme Court, U.S.
FILED
JAN 9 - 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DIANA L. READ,

Petitioner,

v.

ALEX BROWN, *et al.*,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court will decide if *Desert Palace* should apply to summary judgment proceedings when the Fifth Circuit considered *Desert Palace* and when Petitioner has failed to demonstrate a conflict in the courts on this issue.

2. Whether this Court will decide if *Desert Palace* should apply to ADEA claims when the Fifth Circuit considered *Desert Palace* in its decision on Petitioner's ADEA claim.

3. Whether this Court will decide how to define direct evidence of discrimination when the Fifth Circuit analyzed Petitioner's evidence under the definition she now proposes and when the alleged conflict among lower courts is semantic, not real.

4. Whether this Court will decide Petitioner's contention that the Fifth Circuit ignored *Reeves* despite the Fifth Circuit's specific references to *Reeves* and specific application of its law to Petitioner's evidence.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are Diana Read and BT Alex. Brown, Incorporated.[1] Brown was a predecessor to Deutsche Bank Securities Inc., which is an indirect subsidiary of Deutsche Bank, AG. Deutsche Bank, AG is a banking corporation organized and existing under the laws of the Federal Republic of Germany; its shares are traded on the New York Stock Exchange and throughout the world on other exchanges.

[1] Read's appeal of the District Court's decision was limited to the decision in favor of BT Alex. Brown. To the extent Read now attempts to appeal a decision in favor of any party other than BT Alex. Brown (by listing as the Respondent "Alex. Brown, *et al.*"), her attempt is barred due to her failure to include a reference to such parties in her appeal to the Fifth Circuit.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
RESPONDENT'S BRIEF IN OPPOSITION	1
STATEMENT OF THE CASE	1
A. Nature of the case in the proceedings below	1
B. Factual background	1
1. Brown Hires Read	1
2. Read Begins Work at Brown	3
3. Banker's Trust Company Experiences a Severe Financial Crisis	6
4. Rupp Meets with Read About the Layoff	8
C. District Court proceedings	10
D. Court of Appeals' proceedings	13
REASONS FOR DENYING THE PETITION	15
I. THE FIFTH CIRCUIT CONSIDERED *DESERT PALACE* AND READ FAILS TO DEMONSTRATE A CONFLICT REGARDING *DESERT PALACE*'S IMPACT ON SUMMARY JUDGMENT	15
II. THE FIFTH CIRCUIT CONSIDERED *DESERT PALACE* IN ANALYZING READ'S ADEA CLAIM	17

TABLE OF CONTENTS – Continued

Page

III. THE FIFTH CIRCUIT ANALYZED READ'S "DIRECT EVIDENCE" OF DISCRIMINATION UNDER THE DEFINITION SHE NOW PROPOSES AND NO SPLIT EXISTS AMONG THE COURTS ON THE DEFINITION OF DIRECT EVIDENCE 18

IV. THE FIFTH CIRCUIT FOLLOWED *REEVES* 20

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Allen v. City of Pocahontas, 340 F.3d 551 (8th Cir. 2003) 17

Auguster v. Vermilion Parish Sch. Bd., 249 F.3d 400 (5th Cir. 2001) 19

Bauer v. Albemarle Corp., 169 F.3d 962 (5th Cir. 1999) 13

Brown v. CSC Logic, Inc., 82 F.3d 651 (5th Cir 1996) 19

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) 14

Davis v. Emery Worldwide Corp., 267 F. Supp. 2d 109 (D. Me. 2003) 17

Desert Palace, Inc. v. Costa, ___ U.S. ____, 123 S. Ct. 2148 (2003) 14, 15, 16, 17, 18

McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) 12, 16

Mooney v. Aramco Services. Co., 54 F.3d 1207 (5th Cir. 1995) 19

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 19

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) ..... *passim*

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 12

Wright v. Southland Corp., 187 F.3d 1287 (11th Cir. 1999) 15, 18, 19

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, B.T. Alex. Brown, respectfully requests that this Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

A. Nature of the case in the proceedings below

Petitioner accurately states the nature of the case in the proceedings below.

B. Factual background

1. Brown Hires Read.

Diana Read served as an investment broker in Brown's Private Client Division, which provides investment services to corporations and high net worth individuals. During Read's tenure, the Private Client Division maintained a nationwide complement of approximately 400 investment representatives (or brokers), with the Dallas office numbering between approximately 19 and 26. The strategy was to employ a small, and consistently effective, force of brokers whose *production* (i.e., gross commissions earned by the broker for the firm – a key measure of a broker's overall performance) was high or had the potential to become high.

Read had been a high performance broker at Merrill Lynch; in fact, her production placed her in the top 10% of brokers at Merrill Lynch. (2R.APP.021) The year before she left Merrill Lynch, Read had achieved a production level of $560,000 and had $80 million of assets under her management. (2R.APP.021) Merrill Lynch, however, had

terminated her employment in April 1994. (2R.APP.023; 2R.APP.024)

Michael Crossley (then Brown's Dallas office manager) and Jeff Rupp (then Brown's Dallas office sales manager – and the decisionmaker in events to follow, as discussed below) interviewed Read on several occasions. (2R.APP.006; 2R.APP.024; 2R.APP.031) During the interview process, Read informed Crossley of her termination by Merrill Lynch and her contention that Merrill Lynch had discriminated against her on the basis of her age and gender.[2] (2R.APP.026-027) Read also told Rupp about her belief that Merrill Lynch had discriminated against her. (3R.APP.142)

During her interviews, Crossley and Rupp advised Read that the average production of Brown brokers was $500,000 and, at that time, was higher than the average production of other brokerage firms. (2R.APP.037) Read visited Brown's headquarters in Baltimore and met Crossley's boss, Tim Schweizer. Read presented herself as an experienced broker to Crossley and Rupp. (2R.APP.015; 2R.APP.025; 2R.APP.038; 2R.APP.040-043) Crossley wanted to hire Read. (2R.APP.007) Rupp was likewise impressed with Read's performance at Merrill Lynch. (3R.APP.143)

With Rupp's approval, Crossley offered Read a position as a broker. (2R.APP.008; 3R.APP.203) Read accepted Brown's offer. (2R.APP.039) She knew that she was being hired because she was an experienced broker and that she

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[2] Read eventually sued Merrill Lynch for age and gender discrimination. (3R.APP.120-121; 8R.APP.207)

was expected to increase both the volume of her commissions and the volume of assets under management. (2R.APP.015-016) During her 4½ years with Brown, Read never achieved the same level of production she had at Merrill Lynch. (3R.APP.211)

2. Read Begins Work at Brown.

Read began working for Brown in late April 1994. (2R.APP.024) Read knew that Brown would evaluate her based on her production and the assets under her management. (2R.APP.015-018) Read's production goals (established with her agreement), her actual production, assets under her management, and her rank among the Dallas office brokers (based on her production) during her tenure were as follows:

Year	Production Goal[3]	Actual Production	Actual Assets Under Management	Dallas Office Rank[4]
1994	Not Applicable	166,564	14,710,303	17
1995	Not Applicable	288,777	21,940,101	17
1996	500,000	308,595	21,877,480	17
1997	550,000	383,624	28,208,421	17
1998	500,000	304,513	37,937,957	17

(3R.APP.211)

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[3] Production goals are established by the broker. (3R.APP.211; 3R.APP.144)

[4] During Read's tenure, the number of brokers in the office fluctuated between 19 and 26. (3R.APP.211)

During her 4½ years with Brown, Read never achieved the level of production that she had established as a goal for herself. Read received regular feedback regarding her performance; Brown issues monthly production reports stating the broker's production, assets under management, and firm rank, along with other pertinent performance numbers. (3R.APP.211)

Rupp's boss, Tim Schweizer, met annually with the brokers in the Dallas office to communicate information about the business – including a reference to the current "break-even point." (2R.APP.047-049) The break-even point was the amount of production each broker had to generate in order for Brown to make a profit on his or her efforts. If a broker failed to meet the break-even point, Brown lost money on that broker. (2R.APP.049-050) During Read's tenure the break-even point increased from approximately $350,000 to $467,000. (2R.APP.049)

Schweizer's, as well as Brown's, goal had always been to increase the average production per broker. (2R.APP.052) The average production of Brown's brokers nationwide increased from $500,000 to approximately $700,000 annually during Read's tenure. (3R.APP.096) During Read's 4½ years with Brown, Read never achieved the average production level of other brokers. Her highest annual production during her tenure, as demonstrated by the chart above, was $383,624. During individual meetings with Read in 1995, 1996, 1997, and 1998, Schweizer asked Read if she needed any help. (3R.APP.169; 2R.APP.062) Schweizer also told Read during these meetings that he wanted her to achieve the break-even point. (3R.APP.094-095)

From early in her tenure, Read acknowledged that she was not satisfied with her own production. Read and Rupp met at least annually about her performance. (3R.APP.078; 3R.APP.122-123) During these meetings, Read confessed that she knew that she was not as productive as she should be. (3R.APP.122-123) In early 1996, Read admitted to Rupp that she was dissatisfied with her performance. (3R.APP.078) Read, however, blamed her poor performance on her difficulties in transferring clients from Merrill Lynch, which she had left in 1994, and on her lawsuits involving Merrill Lynch. (3R.APP.079; 3R.APP.124) At this early point in her tenure, Rupp indicated that he was not worried about her performance. (3R.APP.078-079)

In 1997, however, Rupp began counseling Read about her performance. Read acknowledged that her attention to business had been distracted:

> I told him that I was glad the lawsuits . . . was [sic] over, that I felt like it had interfered with my time and I would be able to concentrate a little bit better on business. (3R.APP.124)

During this time frame, Read was a litigant in two lawsuits – a sex and age discrimination case that she filed against Merrill Lynch and a securities case that a client filed against Read and Merrill Lynch. (3R.APP.124-125; 2R.APP.044-045; 8R.APP.207)

In early 1998, Schweizer announced in a group meeting and in a separate meeting with Read that each broker needed to reach $400,000 in production. (2R.APP.050-051) He also warned Read that she, too, needed to increase her production. (2R.APP.051)

In September 1998, Read's substandard production became critical. Rupp met with her and explained that she needed to significantly increase her production. (3R.APP.124) Her 1998 production (ultimately less than $300,000 to December 1, 1998) was simply insufficient. (3R.APP.206) Read realized the gravity of the situation – she believed she was in danger of losing her job. (3R.APP.082-083) Rupp asked her how he could help her grow her business. (3R.APP.081.1) Rupp observed that her production at Brown never had reached the levels she achieved while at Merrill Lynch. (3R.APP.084-084.1)

3. Banker's Trust Company Experiences a Severe Financial Crisis.

In late 1998, Brown's parent company at that time, Banker's Trust, experienced a tremendous financial crisis which required immediate and severe cost cutting measures within Banker's Trust and its subsidiaries, including the Brown Private Client Division. (3R.APP.211) Schweizer, the national head of the Private Client Division, instructed each of his branch managers, including Rupp, to reduce his office's expenses immediately. (3R.APP.167; 3R.APP.177; 3R.APP.145)

Rupp determined that he had to reduce the headcount in the office in order to meet the reduction target. Because reducing the number of sales assistants would adversely affect the brokers to whom the sales assistants were assigned and consequently reduce the productivity of the office, Rupp decided to select an unproductive broker for termination. (3R.APP.212)

Rupp then had to decide which broker would be laid off. At this time, the Dallas office of Brown employed the following brokers whose production was low[5]:

Broker	Gender	Age as of Nov. 1998	Years with Securities License	1998 Production through Nov. 1998
Read, Diana	F	54	15	$297,568[6]
Blackmar, Roger	M	67	41	$231,775
High, Chris	M	28	4	$149,181
Villarreal, Lynda	F	28	2	$ 10,786
Palmer, Jaime	M	25	8 months	$ 3,120

Rupp knew that Read, Roger Blackmar, Chris High, Lynda Villarreal, and Jaime Palmer had low production (as reflected in the chart above). Rupp decided to choose the broker to be laid off based on overall performance. (3R.APP.212) While the concept of performance includes production, it also embraces the broker's ability to open new accounts, increase the amount of assets under his or her management, make presentations to potential clients, and locate potential clients. (7R.APP.161-162)

Out of the five brokers, Read's performance was the lowest. High and Villarreal were all new to the business

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[5] All information in the chart is contained in 3R.APP.205-206.

[6] Read's assertion that her 1998 production was $403,296 is misleading. (Pet. 7) Read only reaches this number by defining 1998 as the last quarter of 1997 through the third quarter of 1998. (Pet. 6) It is uncontested that her production from January 1, 1998 through November 1998 was $297,568.

and had the potential to be successful brokers; each had been a broker for less then one year (despite having their license prior to becoming brokers). (3R.APP.212) Palmer was part of a team that had an extremely successful book of business serving clients who resided in Mexico and had only been a broker for less than a year. (3R.APP.212) Blackmar (who was age 67 at the time and had 41 years experience) had strong relationships with many Brown clients and potential clients and was in the process of transitioning these clients and contacts to other Brown brokers. (3R.APP.212)

Read, then, was Rupp's logical business choice for the layoff. Read had never met Brown's expectations. (3R.APP.135.1) When Read came to Brown, she claimed a Merrill Lynch production level of $560,000. (2R.APP.022; 2R.APP.028-029) During her entire tenure at Brown, however, her highest annual production level was $383,624. Read fell below her own expectations; she never even met the production goals she set for herself. In fact, Read always ranked as one of the lowest producers in the office. (3R.APP.205-206)

4. Rupp Meets with Read About the Lay-off.

On or about December 1, 1998, Rupp met with Read. (3R.APP.113) Her production for the first eleven months of 1998 was $297,568. (3R.APP.211) According to Read, the statements by Rupp[7] and by her in this meeting were as follows:

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[7] Read's characterization of this conversation in her Petition as Rupp telling her that her employment was terminated because of her

(Continued on following page)

A: We sat down. The very first thing he said, he said, We're doing some cost cutting and you and I are going to have to part company.

Q: Okay.

A: And I said, Well, if you're doing cost cutting, why would you fire me if I'm bringing in $400,000? And he said, The cutoff is 467 and you're not doing 467 . . .

I'm sure there was some other discussion, but sitting here right now, I cannot remember.

(3R.APP.114)

Read then spoke with Schweizer about the termination:

Q: And you called him and the first thing you said was?

A: . . . I really liked my job and I was going to do over 400,000 this year and why did he see fit to be terminating me, and he said, well, the cutoff's 467.

These conversations make clear that Brown communicated the reason for her termination – cost cutting – to her. These conversations also make clear that Read, not Brown, is the one who asserts that the criterion for the reduction in force was production less than $467,000.

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failure to "meet the cut off of $467,000" is grossly inaccurate, as demonstrated by Read's quoted deposition testimony.

Ultimately, Read's production for the entire year of 1998 was $304,513. (3R.APP.211)

C. District Court proceedings

On January 7, 2002, the District Court granted Brown's summary judgment motion and dismissed Read's claims. The District Court held that a reasonable trier of fact could not find that Brown subjected her to differential terms and conditions of employment based upon her age or sex. (Pet. App. 6sa) The District Court also held that Read failed to show intentional discrimination on the basis of sex or age in the termination of her employment through either direct or indirect evidence of discrimination. Importantly, the District Court considered all of Read's evidence, as a whole, and concluded that Read had *neither* direct *nor* circumstantial evidence of discrimination on *any* of her claims of discrimination. (Pet. App. 18sa)

In addressing Read's claims of having been subjected to "differential terms and conditions" during her employment,[8] the District Court reviewed each of the five acts that Read alleged as constituting differential terms and conditions of employment. (Pet. App. 3sa) In reaching its conclusion, the District Court considered Read's allegations relating to differential terms and conditions of employment, separately and as a whole, and applying appropriate precedent, held that a reasonable trier of fact could not find that Brown intentionally discriminated

[8] The court did not address Brown's claim that these claims are time-barred.

against Read in the terms and conditions of her employment based upon her age or sex, as discussed below (Pet. App. 6sa):

Term and Condition	District Court Reasoning
1. Less sales assistant coverage	No evidence of sex or age discrimination because Read received the same treatment as men over and under age 40. (Pet. App. 4-5sa)
2. Access to training programs	No evidence of sex or age discrimination because Read did not ask for nor was denied the opportunity to attend training programs. (Pet. App. 5sa)
3 & 4. Fewer referrals of and help with corporate clients	No evidence of sex or age discrimination because her evidence that Rupp helped newer brokers was not probative and the only person whom Read identified as receiving corporate clients was a male over age 40. (Pet. App. 5-6sa)
5. Treating younger and male brokers "with more respect"	Rupp's alleged rudeness to her on two occasions was not probative, particularly in light of her testimony that Rupp was also rude to male brokers. (Pet. App. 6sa)

The District Court next addressed whether Read proffered direct evidence of unlawful discrimination. Once again, reviewing these comments in the light most favorable to Read as a summary judgment nonmovant, and specifically applying *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the District Court

concluded that such comments did not constitute direct evidence of discrimination (Pet. App. 10sa):

Alleged comment	**District Court Reasoning**
When brokers get old, they slow down. Jim's old but he's not slow. I'm hoping that even though you are older, you are not going to be slow.	Although the comment was related to age and was made by the decisionmaker, the comment was made in 1995 and thus was not proximate to the 1998 termination decision. (Pet. App. 9sa)
I want to hire a young man out of college who will work real hard.	The comment does not relate to the termination decision because it was about hiring of a sales assistant and (because it was made in 1995) was not proximate to the termination decision. (Pet. App. 9sa)
We have very high standards here; we're like Goldman Sachs.	While the comment was made near the time of termination by the decisionmaker, the only "evidence" that this relates to a protected class is Read's unsupported conclusion that "Goldman Sachs is pretty much known for not hiring women." (Pet. App.9sa-10sa)

The District Court next turned to Read's claim that she offered indirect or circumstantial evidence of discrimination. In doing so, the Court once again examined the issue applying Supreme Court precedent, including *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *Reeves*. In doing so, the Court,

quoting *Reeves*, noted that "proof that the Defendant's explanation is unworthy of credence is simply *one form of circumstantial evidence that is probative of intentional discrimination*, and it may be quite persuasive." [Emphasis added.] (Pet. App. 11sa) Applying the facts as alleged by Read against this legal backdrop, the District Court found that the evidence, viewed in the light most favorable to Read, did not raise a genuine issue of material fact regarding pretext or that her age and/or her sex was a "motivating factor in Brown's decision to terminate her." (Pet. App. 17sa-18sa) To reach the conclusion that Read failed to establish a discriminatory motive in the termination, the District Court examined all of the evidence in the case, including, but not limited to, the alleged differential terms and conditions of employment, the alleged comments and the alleged inconsistencies in the reason for termination.[9]

D. Court of Appeals' proceedings

The Fifth Circuit affirmed the decision of the District Court. The Court analyzed Read's Title VII and ADEA claims concurrently since "[t]he same evidentiary procedure for allocating burdens of production and proof applies to discrimination claims under both statutes," (Pet. App. 5a n.9, quoting *Bauer v. Albemarle Corp.*, 169 F.3d 962,

[9] The District Court rejected Read's argument that Brown was inconsistent in its reasons for termination. Read characterized Rupp as having said that she was terminated because her production was less than $467,000. The District Court reviewed the evidence, Read's own deposition testimony, and found Brown's reason for termination to be consistent with Read's testimony. (Pet. App. 15sa)

966 (5th Cir. 1999)). The Fifth Circuit analyzed Read's claims against Supreme Court precedent, including *Reeves* (Pet. App. 4a), *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) (Pet. App. 5a), and *Desert Palace, Inc. v. Costa*, ___ U.S. ____, 123 S.Ct. 2148 (2003) (Pet. App. 5a).

Analyzing first her differential terms and conditions claim, the Fifth Circuit concluded, applying *Reeves*, that Read failed to raise a genuine factual dispute concerning "the central question of discriminatory animus." (Pet. App. 7a-8a, citing *Reeves*). Consequently, the Fifth Circuit concluded that none of Read's evidence, "taken individually or as a whole," raised a fact issue as to whether Brown treated Read differently because of her age or sex. (Pet. App. 11a)

The Fifth Circuit reached the same conclusion with regard to Read's claims of discriminatory discharge. It found that two of the alleged comments were "patently not direct evidence of discrimination." (Pet. App. 12a), and that the third, "considered in isolation or together with other remarks, [was] simply not meaningfully probative of discriminatory animus in Read's termination" (Pet. App. 14a)

The Fifth Circuit next considered Read's claims of circumstantial evidence of discrimination. The court once again painstakingly walked through each of Read's alleged "incidents" of discrimination and concluded that the "District Court correctly awarded summary judgment to Brown on her claim of discriminatory discharge." (Pet. App. 17a) In doing so, the court specifically found that there was insufficient evidence from which a reasonable jury could conclude that Brown's explanation for her termination was pretextual (citing *Reeves* at 530 U.S. 146)

or that her termination was motivated by animus. (Pet. App. 18a)

In analyzing Read's evidence, the Fifth Circuit specifically addressed Read's arguments concerning the Eleventh Circuit's decision in *Wright v. Southland Corp.*, 187 F.3d 1287, 1288 (11th Cir. 1999) (Pet. App. 12a n.13). In doing so, the court found that Read's arguments concerning the definition of direct and circumstantial evidence was of no moment in this case because by any measure, such evidence was neither directly nor circumstantially sufficiently probative of discriminatory intent (i.e., motivation) in respect to Read's termination. (Pet. App. 13a n.13)

REASONS FOR DENYING THE PETITION

I. THE FIFTH CIRCUIT CONSIDERED *DESERT PALACE* AND READ FAILS TO DEMONSTRATE A CONFLICT REGARDING *DESERT PALACE*'S IMPACT ON SUMMARY JUDGMENT.

The analysis of and results reached by the District Court and the Fifth Circuit in *Read* are in step with *Desert Palace*. It is elementary that regardless of the convention used to arrive at the destination, the ultimate destination is a determination of whether there is probative evidence of discrimination – that the decision was motivated by statutorily prohibited considerations (in this case, gender and age). Ultimately, both the District Court and Fifth Circuit determined, using the established Supreme Court precedent, that the evidence – taken in a light most favorable to Read – did not support an inference of discrimination under *any analysis*. Thus, whether the standard is direct evidence, circumstantial evidence, pretext,

motivating factor, or otherwise, the courts below have found that Read failed to proffer evidence upon which a reasonable jury could find discriminatory motivation. Consequently, Read's arguments concerning the effect of *Desert Palace* on summary judgment (and as discussed below, its application under the ADEA, the definition of direct evidence, and the application of *Reeves*) become merely an academic exercise, not one that changes the result in this case. Consequently, this Court should deny the petition.

The precise holding of *Desert Palace* was that circumstantial evidence of discrimination may support a mixed motive jury instruction. *Desert Palace*, 123 S.Ct. at 2150 & 2155. Thus, the inquiry under *Desert Palace* follows the following stream of logic:

First, a determination must be made, initially by the judge as gatekeeper and then by the jury, whether there is sufficient evidence of discriminatory motivation; and second, if so, whether the employer would have made the same decision absent the discriminatory motivation. The burden of proof in the first inquiry is on the plaintiff; and on the second, the defendant.

It has long been the law that a plaintiff may prove discrimination through the *McDonnell-Douglas* pretext analysis or through other evidence of discriminatory animus. *Reeves*, 630 U.S. at 146-47. Indeed, Read, herself, acknowledges that the threshold question (even under her suggested application of *Desert Palace*) becomes whether the prohibited characteristic was a motivating factor in the adverse employment action. (Pet. 12) As noted above, the courts below specifically considered Read's summary judgment evidence viewed in the light most favorable to

her, and applying Supreme Court precedent, concluded that there was insufficient evidence for a rational jury to find discriminatory intent.

In any event, Read fails to demonstrate that the circuit courts are split on whether *Desert Palace* applies to summary judgment proceedings and what its impact is. In fact, the only circuit case Read cites expressly declines to reach this issue, although it does note that the result there would be the same because there was no evidence from which a jury could "logically infer that age or gender was a motivating factor in her termination." *Allen v. City of Pocahontas,* 340 F.3d 551, 557 (8th Cir. 2003).

Read's only other evidence of "conflict" among courts consists of district court cases (only one of which allegedly precluded application of *Desert Palace*) and of her own case. *See*, *Davis v. Emery Worldwide Corp.*, 267 F. Supp. 2d 109, 120, n.2 (D. Me. 2003). (Pet. 11) Read claims that the *Davis* court, as a matter of law, refused to apply *Desert Palace* in a summary judgment setting. A closer examination of the case reveals that Read's characterization is inaccurate. The *Davis* court found that the evidence raised "no possibility of a mixed motive," given the defendant's "tacit admission" that pregnancy was the basis for its decision and thus, *Desert Palace* simply did not apply.

II. THE FIFTH CIRCUIT CONSIDERED *DESERT PALACE* IN ANALYZING READ'S ADEA CLAIM.

The Fifth Circuit applied the "same evidentiary procedure for allocating burdens of production and proof" to Read's Title VII and ADEA discrimination claims. (Pet. App. 5a) This relegates the question in this case of whether *Desert Palace* should apply to her ADEA claims to

a mere academic exercise. As stated earlier, *Desert Palace* teaches that if the employment decision at issue was the subject of improper motive, the jury can receive a mixed motive instruction. Here, the lower courts found that Read, as a matter of law, failed to proffer evidence that would support a finding of improper motive. In doing so, the lower courts negated any need for consideration of whether *Desert Palace* should apply to ADEA cases.

III. THE FIFTH CIRCUIT ANALYZED READ'S "DIRECT EVIDENCE" OF DISCRIMINATION UNDER THE DEFINITION SHE NOW PROPOSES AND NO SPLIT EXISTS AMONG THE COURTS ON THE DEFINITION OF DIRECT EVIDENCE.

Read's discussion on alleged fine distinctions between the Fifth Circuit's definition of direct evidence and the Eleventh Circuit's definition in *Wright* has no relevance in this case because, as the Fifth Circuit explained:

> [T]he result here would clearly be the same even absent the direct/circumstantial evidence distinction (or our court's definition of those terms for this purpose), for the three comments in question, taken together, are simply insufficiently probative of discriminatory intent in respect to Read's December 1998 termination, particularly in light of Brown's undisputed evidence of its nondiscriminatory reason for Read's termination. Nothing in our affirmance here is inconsistent with the result in *Wright*.
>
> (Pet. App. 13a)

Analysis of the alleged conflict in definitions reveals that Read has set up an artificial distinction between the

preponderance and dictionary definitions of direct evidence based upon *Read* and *Mooney v. Aramco Services Co.*, 54 F.3d 1207 (5th Cir. 1995), and *Wright.*[10] The Eleventh Circuit's analysis in *Wright* yields the same substantive result as the Fifth Circuit's analysis in *Read* and *Mooney*. In *Wright*, the Eleventh Circuit attempted to distinguish what it called the dictionary definition of direct evidence (which, the court said, required a direct admission by the decisionmaker that discrimination motivated the decision) from its preferred preponderance definition (namely, "a causal link between an adverse employment action and a protected personal characteristic."). *Wright,* 187 F.3d at 1293. The Eleventh Circuit then embarked upon a detailed analysis of cases and ultimately relied on precisely the same factors isolated by the Fifth Circuit in the four-part *Brown v. CSC Logic, Inc.* test which the Fifth Circuit has adopted in *Auguster* as the correct standard for direct evidence. *Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 404-05 (5th Cir. 2001); *Brown v. CSC Logic, Inc.*, 82 F.3d 651 (5th Cir 1996). The Eleventh Circuit's analysis was elaborate, but the ultimate destination was the same as *Mooney*. *Wright*, 187 F.3d at 1293. This established jurisprudence is consistent with the concurring opinion of Justice O'Connor in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 276 (1989) (referring to "direct evidence that discriminatory animus played a significant or substantial role in the employment decision"). Consequently, there is no "split" in the circuits as to

[10] That portion of the *Wright* opinion announcing Read's proposed definition of direct evidence is dictum and is not joined by the other two judges on the *Wright* panel. *See Wright,* 187 F.3d at 1306 (Judges Cox and Hall concurring in the judgment and result respectively).

the definition of direct evidence, even if such definition were applicable here.

IV. THE FIFTH CIRCUIT FOLLOWED *REEVES*.

As fully embraced by the Fifth Circuit below, *Reeves* explains that courts analyzing summary judgments "should review all of the evidence in the record" and "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves* at 530 U.S. 150-51. The Fifth Circuit did so in this case. Read's real complaint is that she disagrees with the Fifth Circuit's application of established law to fact.

Read claims that the Fifth Circuit found the alleged comment about older brokers as not probative of discrimination because of its "vintage" and that such finding conflicts with *Reeves*. There is no such conflict. The Fifth Circuit found that this comment was not probative because it occurred at the beginning of her tenure *and* because she presented evidence of no other similar comments during her four-year tenure.

Read also claims that the Fifth Circuit improperly required her to have "substantial evidence of pretext."[11] Her argument mischaracterizes the Fifth Circuit's opinion only by citing part of it. In this discussion, the Fifth Circuit properly states that "where the plaintiff . . . produces evidence permitting only an indisputably tenuous inference of pretext, summary judgment in favor of the

[11] Read's argument that Rupp's reference to Oppenheimer constitutes pretext should not be considered because she first made this argument to the District Court in her Motion for Reconsideration, which was properly denied.

defendant is appropriate." (Pet. App. 6a) Consistent with *Reeves*, the Fifth Circuit found that Read failed to present evidence of pretext.

Read also argues that the Fifth Circuit failed to review evidence in the light most favorable to Read. This is simply incorrect. In its opinion, the Fifth Circuit repeatedly acknowledged that it must adhere to the requirement that it view the evidence in the light most favorable to Read, and it did so. Read's real complaint is that the Fifth Circuit failed to accept her "spin" on the evidence. For example, Read claims that the Fifth Circuit "used Brown's version of the facts, cited at page 15 of Brown's brief." (Pet. 27) The referenced evidence on page 15 is not Brown's "version" of the facts; it quotes Read's own testimony. Thus, the Fifth Circuit complied with *Reeves*.

CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 2 0 2004
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(4)

No. 03-826

IN THE

Supreme Court of the United States

DIANA L. READ,

Petitioner,

v.

ALEX BROWN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE FIFTH CIRCUIT DID NOT APPLY *DESERT PALACE* IN ITS SUMMARY JUDGMENT ANALYSIS, CREATING A SPLIT IN THE CIRCUITS 1

II. RESPONDENT CONCEDES THERE IS A SPLIT IN THE CIRCUITS ON WHETHER *DESERT PALACE* APPLIES TO THE ADEA AND ARGUES WITHOUT MERIT THAT BECAUSE THE FIFTH CIRCUIT'S RULING APPLIED *DESERT PALACE* TO THE ADEA, THE SPLIT IN THE CIRCUITS IS IRRELEVANT 4

III. DEPENDING UPON THE COURT'S ANSWER TO QUESTION ONE IN THE PETITION, THE SPLIT IN THE CIRCUITS OVER THE DEFINITION OF DIRECT EVIDENCE IS NOT ACADEMIC 5

IV. THERE IS A SPLIT IN THE CIRCUITS BECAUSE THE FIFTH CIRCUIT DOES NOT FOLLOW *REEVES* 6

A. The Fifth Circuit's "Vintage" Conflicts with Reeves 6

B. The Fifth Circuit's "Substantial Evidence" Test Conflicts with Reeves 7

C. The Fifth Circuit's Willingness to Ignore Petitioner's Evidence and to Accept the Spin on the Evidence of the Summary Judgment Movant Conflicts with Reeves 8

CONCLUSION 9

TABLE OF AUTHORITIES

CASES	Page
Bolander v. BP Oil Co., _ F.Supp.2d _, 2003 WL 22060351 (N.D.Ohio, 2003)	4
Desert Palace v. Costa, __ U.S. __, 123 S.Ct. 2148 (2003)	1-5
Hill v. Lockheed Martin Logistics Management, Inc., _F.3d._, 2004 WL 25018 (4th Cir. 2004)	2, 3
McDonnell Douglas-Burdine, 411 U.S.792, 93 S.Ct.1817, 1825-26 (1973)	2, 4
Price Waterhouse v. Hopkins, 490 U.S. 228.104 L.Ed.2d 268 (1989)	5
Read v. BT Alex Brown Inc.	2-5
Reeves v. *Sanderson Plumbing Products*, 530 U.S. 133, 147 L.Ed.2d 105 (2000)	6-8
Stegall v. Citadel Broadcasting Co., _F.3d_, 2004WL 26582 (9th Cir. 2004)	3

IN THE

Supreme Court of the United States

No. 03-826

DIANA L. READ,

Petitioner,

v.

ALEX BROWN, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. THE FIFTH CIRCUIT DID NOT APPLY *DESERT PALACE* IN ITS SUMMARY JUDGMENT ANALYSIS, CREATING A SPLIT IN THE CIRCUITS.

Respondent's Brief in Opposition contains two central flaws on question one of the Petition for Certiorari. First, instead of showing that the Fifth Circuit somehow actually applied *Desert Palace* in its summary judgment analysis, Respondent notes that *Desert Palace* specifically held that circumstantial evidence of discrimination supports a mixed motive jury instruction. (Brief in Opp. 16) Respondent then

effectively concedes Petitioner's point, that *Desert Palace* applies in the summary judgment process by stating:

> First, a determination must be made, *initially by the judge as gatekeeper* and then by the jury, whether there is sufficient evidence of discriminatory motivation; and second, if so, whether the employer would have made the same decision absent the discriminatory motivation. The burden of proof in the first inquiry is on the plaintiff; and on the second, the defendant.

(Brief in Opp. 16, emphasis added) But then Respondent ignores the fact that the Fifth Circuit, in *Read*, failed to apply *Desert Palace* in its gatekeeper role. *Desert Palace* flatly holds that circumstantial evidence is equal to direct evidence. The Fifth Circuit *did not* utilize this ruling in its analysis. Instead, the Fifth Circuit, in *Read*, did this: (1) it rejected Petitioner's evidence in the form of five ageist and/or sexist statements as either not direct evidence or, meaningless direct evidence due to "vintage," then, without further ado (2) it applied a pretext analysis under *McDonnell Douglas-Burdine* (Pet. App. 5a).

Under this approach, the Fifth Circuit avoids the summary judgment impact of *Desert Palace*. In her discrimination suit, Petitioner has two proof mechanisms available. First, she can directly persuade the court that a discriminatory reason motivated the employer's adverse employment decision, using either direct or circumstantial evidence. The second method of proof is the pretext analysis under *McDonnell Douglas-Burdine*. *See Hill v. Lockheed Martin Logistics Management, Inc.*, _F.3d._, 2004 WL 25018, *3-5 (4th Cir. 2004).

Under *Desert Palace*, Read's evidence of five discriminatory statements, even if these statements are only circumstantial evidence, entitles Read to a jury trial on motivation (a trial where the employer has the burden of proving that it would have made the same decision absent the discriminatory

motivation). *Read* is a quintessential mixed motive case. Given the evidence of Jeff Rupp's hostility toward "old" brokers and his preference for young men in the Dallas office, coupled with his opportunity in December 1998 to get rid of the oldest female in the Dallas office (Diana Read) as part of cost cutting, the jury must determine if Rupp would have fired Read as part of cost cutting absent his discriminatory animus toward her. Using pre-*Desert Palace* analysis, the Fifth Circuit in *Read* failed to acknowledge that even if not "direct" evidence, these statements go directly to the real motive of Respondent. They indicate that from the moment Jeff Rupp became Diana Read's manager, he thought she was too old and he preferred young men in the Dallas office.

The second central flaw in Respondent's Brief in Opposition is its assertion that Read fails to demonstrate a split in the circuits on whether *Desert Palace* applies to summary judgment proceedings. Respondent's main devise is an apparent assumption that the Fifth Circuit decision in *Read* does not count in determining if there is a split in the circuits. (Brief in Opp. 17). In *Read*, the Fifth Circuit ruled that where a discrimination plaintiff does not have "direct evidence" (per its definition, and indeed, recent direct evidence), she has no evidence of discrimination under the direct proof method and she must live or die under a pretext analysis. Besides the cases mentioned in at Pet. 11-12, the Fourth and Ninth Circuits, in contrast to the Fifth Circuit, have now applied *Desert Palace* in their summary judgment analysis. *Stegall v. Citadel Broadcasting Co.*, __ F.3d __, 2004WL 26582, *4-6 (9th Cir. 2004); *Hill v. Lockheed Martin Logistics Management, Inc.*, _F.3d._, 2004 WL 25018, *3-5 (4th Cir. 2004).

II. RESPONDENT CONCEDES THERE IS A SPLIT IN THE CIRCUITS ON WHETHER *DESERT PALACE* APPLIES TO THE ADEA AND ARGUES WITHOUT MERIT THAT BECAUSE THE FIFTH CIRCUIT'S RULING APPLIED *DESERT PALACE* TO THE ADEA, THE SPLIT IN THE CIRCUITS IS IRRELEVANT.

As Petitioner has argued (Pet. 12-16), the courts are split on whether *Desert Palace*, a Title VII case, applies to age discrimination under the ADEA. This question is fundamental to judicial efficiency as age discrimination cases come forward for summary judgment rulings, jury instructions and appellate review.

Apparently forgetting that *Desert Palace* itself is a case where a circuit court (the Ninth Circuit), turned out to be right but where the circuit court decision created a split in the circuits, Respondent's one paragraph discussion on question two argues that since the Fifth Circuit in *Read* ruled that the same evidentiary procedure for allocating burdens of production and proof apply to Title VII and the ADEA, the question of whether *Desert Palace* applies to the ADEA is "a mere academic exercise." That may be true as to the parties in *Read*, but the point of question two in this petition for certiorari is that *Desert Palace* and *Reeves* leave open an argument that different production and proof procedures apply. Commentators immediately warned of this dispute. A district court in the Sixth Circuit has flatly, but without analysis, ruled that *Desert Palace*, a Title VII case, does not apply to age discrimination cases. *Bolander v. BP Oil Co.*, __ F.Supp.2d __, 2003 WL 22060351 (N.D.Ohio, 2003). Unlike the question of whether the *McDonnell Douglas* framework, developed under Title VII, applies under the ADEA, a question that the Court has never squarely addressed, the question of whether *Desert Palace* applies to the ADEA as

well as Title VII, since it can be outcome determinative, really must be answered.

III. DEPENDING UPON THE COURT'S ANSWER TO QUESTION ONE IN THE PETITION, THE SPLIT IN THE CIRCUITS OVER THE DEFINITION OF DIRECT EVIDENCE IS NOT ACADEMIC.

Respondent incorrectly asserts that there is not a split in the circuits on the definition of direct evidence. A split in the circuits was, after all, one of the bases for this Court to grant certiorari in *Desert Palace*. *Desert Palace v. Costa*, __ U.S. __, 123 S.Ct. 2148, 2155, fn. 3 (2003).

Moreover, depending on the Court's answer to question one of this petition, the definition of direct evidence is neither a "fine distinction," nor irrelevant. (Brief in Opp. 18) If the Court answers question one by holding that *Desert Palace* applies to summary judgment analysis, the Fifth Circuit's dictionary definition, the harsh standard required to shift the burden of proof to the employer, will be irrelevant, since either direct or circumstantial evidence that the employer's adverse employment decision was motivated by sex (or age, depending on the answer to question two) discrimination entitles the plaintiff to a jury trial with a burden shifting instruction. If the Court holds on question one that *Desert Palace* has no place in summary judgment analysis (affirming the Fifth Circuit approach in *Read*), the definition of direct evidence is critical. If Petitioner had direct evidence, she goes to trial. Without direct evidence, her fate depends on the gatekeeper's pretext analysis.

Respondent misreads footnote 13 of the Fifth Circuit's decision in *Read* (Compare Brief in Opp. 18 *with* Pet. App. 13a). The Fifth Circuit's footnote cannot reasonably be interpreted as a holding that a claimant with "direct evidence" per *Price Waterhouse* cannot get to a jury (with the burden of proof now on the employer to show it would have taken the

same adverse employment action absent the discrimination). Footnote 13 is more likely the panel's way of saying that without sufficient proof of pretext, "three comments" (there were really five) are insufficient proof in its view of unlawful motive. This evidence weighing view is mere dicta, given the first paragraph of footnote 13 (Pet. App. 12a-13a). If the last paragraph of footnote 13 (Pet. App. 13a) is really a holding that where an employer's evidence of a nondiscriminatory reason is sufficient to preclude submission of a case to a jury on a pretext theory, the direct proof of motivation method is unavailable, the Fifth Circuit has staked out a position in conflict with this Court and every other circuit.

IV. THERE IS A SPLIT IN THE CIRCUITS BECAUSE THE FIFTH CIRCUIT DOES NOT FOLLOW *REEVES*.

A. The Fifth Circuit's "Vintage" Ruling Conflicts with *Reeves*.

Jeff Rupp, the manager who made the decision to fire Diana Read in 1998, told her in 1995 at a breakfast meeting Read invited Rupp to attend after he had ignored her since she had been hired (by Mike Crossley) that "when brokers get older, they slow down" and that he considered her to be "one of the old ones." Respondent adopted the Fifth Circuit tactic of reducing two statements to one and argues (Brief in Opp. 20) that the Fifth Circuit was correct in ruling that the Jeff Rupp's "comment was not probative because it occurred at the beginning of her tenure *and* because she presented evidence of no other similar comments during her four-year tenure." (*Id.* Emphasis in original.)

Reeves requires the court in summary judgment proceedings to draw all reasonable inferences in favor of the non-moving party and in the light most favorable to her. Respondent makes the bare argument that there is no conflict in the circuits. Neither Respondent, nor the Fifth Circuit, can

dispute the fact that the "vintage" ruling hinges on an inference favoring Respondent that Rupp's age bias against Read somehow (without explanation, or indeed testimony from Rupp) went away between the time he told Read how he felt about old brokers and about her being old and the time Rupp decided to fire Diana Read. Since the Fifth Circuit gives mere lip service to *Reeves*, while other circuits adhere to its holding, there is an important split in the circuits.

B. The Fifth Circuit's "Substantial Evidence" Test Conflicts with *Reeves*.

The Fifth Circuit's ruling on how it can grant summary judgment despite evidence of pretext conflicts with *Reeves*. *Reeves* generally allows discrimination complainants with evidence of pretext to go to trial, setting forth narrow exceptions (see Pet. 24-25). While it is true that Petitioner (Pet. 25) cited only one sentence of two where the Fifth Circuit used the term "substantial evidence," it is not true that leaving out the second sentence mischaracterizes the Fifth Circuit's opinion, as Respondent argues (Brief in Opp. 20). Using the exact devise (a partial quote) that Respondent accuses Petitioner of using, Respondent argues:

> In this discussion, the Fifth Circuit properly states that "where the plaintiff . . . produces evidence permitting only an indisputably tenuous inference of pretext, summary judgment in favor of the defendant is appropriate."

(Brief in Opp. 20-21). When read in full, while the second sentence of the Fifth Circuit discussion ("produces evidence permitting only an indisputably tenuous inference of pretext") is akin (albeit watered down) to some of this Court's language, the Fifth Circuit links its tests with the word "or," so that a court has the right, per the Fifth Circuit (but not per *Reeves*) to grant summary judgment where the plaintiff has sufficient evidence of pretext but does not "produce substantial evidence that the defendant's non-discriminatory

reason is merely a pretext for impermissible discrimination." This is different from the narrow guidelines set in *Reeves* and favors the movant. *Reeves* gave specific guidance:

> Thus, a plaintiff's prima facie case, combined with ***sufficient*** evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.
>
> This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth ***sufficient*** evidence to reject the defendant's explanation, ***no rational factfinder could conclude that the action was discriminatory. For instance***, an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, *or* if the plaintiff created only a *weak* issue of fact as to whether the employer's reason was untrue ***and there was abundant and uncontroverted independent evidence that no discrimination had occurred***.

Reeves, 120 S.Ct. at 2109 (italics in original; bold italics supplied). The Fifth Circuit, in conflict with *Reeves* and the other circuits, substitutes the word "substantial" for the word "sufficient" used by this Court. These are different words with important differences and different meanings. In the context of *Reeves*, sufficient means sufficient. Sufficient does not mean substantial.

C. The Fifth Circuit's Willingness to Ignore Petitioner's Evidence and to Accept the Spin on the Evidence of the Summary Judgment Movant Conflicts with *Reeves*.

Respondent, along with the Fifth Circuit, misses the point of *Reeves* when it argues that "Read's real complaint is that the Fifth Circuit failed to accept her 'spin' on the evidence." (Brief in Opp. 21, citing Pet. 27)

Here is the point, one that shows that the Fifth Circuit has rejected the holding in *Reeves* that the court on summary judgment is not free to weigh evidence or to ignore evidence favorable to the movant. Per *Reeves*, whether the movant or the court likes it or not, so long as it is reasonable, the court indeed must give the evidence the "spin" favorable to the nonmovant and cannot accept the spin of the movant. Petitioner pointed the district court and the Fifth Circuit to Read's testimony, with page references to the record (Pet. 27) showing that Respondent absolutely changed its stated reason for terminating her after she pursued her discrimination claim. This is classic pretext evidence.

The fact that Respondent can spin the evidence by citing the court to a different page in the Read deposition transcript that (while in no way contradicting the testimony Read showed to the district court and the Fifth Circuit and that they ignored) is not as specific, does not free those courts to ignore Read's more specific testimony and focus on the transcript page Respondent prefers. It is one thing for a jury to weigh the evidence this way. *Reeves* says the courts cannot behave this way. It would be appropriate for this Court to bring the Fifth Circuit into line with *Reeves* and the circuits that treat *Reeves* as good law.

CONCLUSION

Petitioner respectfully prays that the Court grant certiorari on her four questions.

Respectfully submitted,

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FILED
FEB 18 2003
OFFICE OF THE CLERK

(5)

No. 03-826

IN THE

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DIANA L. READ,

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v.

ALEX BROWN, *et al.*,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

PURPOSE OF SUPPLEMENTAL BRIEF

Petitioner submits her Supplemental Brief to call attention to new cases bearing on Petitioner's first question in her Petition for Certiorari:

> Does this Court's *Desert Palace* decision apply at the summary judgment phase of litigation, and if so, what is its impact?

Since Read filed her Petition for Writ of Certiorari in this matter in November, 2003, district courts, the judiciary's front line ruling on summary judgment motions, have "come to multiple conclusions" about the "potential broader impact of *Desert Palace*" in summary judgment analysis. *Ordahl v.*

Forward Technology Industries, Inc., _ F.Supp.2d _, 2004 WL 213189, *2 (D. Minn. 2004)(Appendix A hereto). A district court within the Fifth Circuit, citing *Read v. BT Alex Brown Inc.*, 72 Fed. Appx. 112 (5th Cir. 2003), has concluded that *Desert Palace* has no impact on summary judgment analysis, that the law the judge applies in ruling on a summary judgment motion is different from the law the jury applies when the case is submitted to the jury for a decision. Federal District Judge Lindsay paraphrases the nonmovant's argument in a Title VII/ADEA case:

> Owens maintains [that *Desert Palace*] dictates that "summary judgment should only be granted in employment discrimination cases if an employer can demonstrate that the employee has failed to raise a genuine issue of material fact concerning whether or not a protected characteristic was a motivating factor in an employment decision." Pl. Am. Resp. At 8. In other words, Owens contends that the [*McDonnell Douglas*] burden-shifting framework is no longer applicable.

Owens v. Excel Management Services, Inc., et al, _F.Supp._ , Civil Action No. 3:02-CV-0835-L (Feb. 13, 2004)(Appendix B, p.5).

Judge Lindsay limits *Desert Palace* to a jury instruction decision and reasons that because *Read*, *supra*, cited to *Desert Palace* but applied the *McDonnell Douglas* burden shifting framework to plaintiff's sex and age discrimination claims, *Desert Palace* has no impact on summary judgment analysis. Judge Lindsay noted:

> If the Fifth Circuit believed that *Desert Palace* abrogated the burden-shifting framework set forth in *McDonnell Douglas*, it certainly would have deemed it necessary to elevate *Read* to the status of a published opinion, rather than making it an unpublished opinion having no precedential value.

Id., App. B, p. 6, fn. 4.

Judge Lindsay supplies an analysis of the Supreme Court's meaning in *Desert Palace*:

> If Owen's suggestion that the *McDonnell Douglas* burden shifting paradigm no longer exists after *Desert Palace* is correct, such a change would constitute a revolution in employment discrimination law. If the Supreme Court were going to make *a draconian departure* from 30 years of well-established employment law precedent, the court believes it would have done so with unmistakable clarity. In *Desert Palace*, the Supreme Court does not even intimate that it is overruling, restricting or clarifying *McDonnell Douglas*.

Id. (emphasis added). *See also* Judge Lindsay's ruling that *Desert Palace* has no impact on summary judgment analysis in *Winter v. Bank of America, N.A.*, _ F.Supp.2d _, 2003 WL 23200278, *3 (N.D. Tex. 2003)(Appendix C hereto).

The district court uses the term "draconian," (defined in the dictionary as "inhumanly severe or cruel"[1]). The district court's view that considering circumstantial evidence the equivalent of direct evidence in summary judgment analysis would be draconian sounds like a policy argument in favor of liberally granting summary judgment motions for employers. Such a view is at odds with this Court's unanimous decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) that criticizes the Fifth Circuit for its approach to summary judgment, an approach that facilitates dismissal of employment discrimination cases and with this Court's unanimous decision in *Desert Palace* that taught juries (and presumably judges) to treat "circumstantial and direct evidence alike . . . ." *Desert Palace v. Costa*, _ U.S. _, 123 S.Ct. 2148, 2154 (2003).

---

[1] Webster's New World Dictionary of the American Language, College Ed. 1964, p. 439.

Other district courts have reasoned that *Desert Palace* does impact summary judgment analysis. Some conclude that *Desert Palace* requires that the *McDonnell Douglas* framework be dropped in favor of the process laid out in 42 U.S.C. § 2000e-2(m). *See, e.g., Dare v. Wal-Mart Stores, Inc.*, 267 F.Supp.2d 987, 990-93 (D. Minn. 2003).

Other courts have concluded that

> *Desert Palace* necessitates modifying the third step of the *McDonnell Douglas* framework "so that it is framed in terms of whether the plaintiff can meet his or her ultimate burden to prove intentional discrimination, rather than in terms of whether the plaintiff can prove pretext."

Ordahl, *supra* at *3, *citing Brown v. Westaff*, _ F.Supp.2d _, 2004 WL 67654, at *4-5 (D.Minn. 2004)(quoting *Dunbar v. Pepsi-Cola General Bottlers of Iowa, Inc.*, _F.Supp.2d_, 2003 WL 22290229, *15). The district court in *Ordahl* explains:

> In other words, in order to survive summary judgment under the *McDonnell Douglas* analysis, a plaintiff is no longer limited to demonstrating pretext, i.e. that the defendant's asserted reason was false. Rather, at step three, a plaintiff need only present sufficient evidence, of any type, for a jury to conclude that the plaintiff's disability was a "motivating factor," even though the defendant's legitimate reason may also be true or have played some role.

Id.

The views of these district courts are fundamentally different and critically important. Without a swift resolution of Question One, the courts, the parties, and practitioners are left on the busy, outcome determinative road of summary judgment practice without a map. If *Desert Palace* is the law for judges as well as juries in employment discrimination cases, all the cases that end in summary judgment under

pre-*Desert Palace* analysis will likely be reversed on appeal. Such a course assures untold delay, expense and judicial inefficiency.

CONCLUSION

Petitioner respectfully prays that the Court grant certiorari on her four questions.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

[Filed Feb. 13, 2004]

Civil Action No. 3:02-CV-0835-L

BRENDA J. OWENS,

Plaintiff,

v.

EXCEL MANAGEMENT SERVICES, INC. and
VARTEC TELECOM, INC.,

Defendants.

MEMORANDUM OPINION AND ORDER

Before the court are Excel Management Services, Inc.'s Amended and/or Supplemental Motion for Summary Judgment, filed October 31, 2003; and VarTec Telecom, Inc.'s Amended and/or Supplemental Motion for Summary Judgment, filed October 31, 2003.[1] After careful consid-

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[1] The history related to the motions for summary judgment is tortuous and reminiscent of the labyrinths referenced in Greek mythology. Defendants filed their motions for summary judgment and appendices on August 29, 2003. Plaintiff filed her appendix to her response on September 18, 2003 and her response on September 19, 2003. On September 22, 2003, Plaintiff filed a supplement to her appendix in which she attached two pages of deposition testimony that were inadvertently omitted from her appendix. On October 3, 2003, Defendants filed their replies. On October 7, 2003, Defendant Excel Management Services, Inc. supplemented its appendix by attaching the corrigenda page of a deposition used by Plaintiff in her response. On October 31, 2003, Defendants filed amended motions for summary judgment to correct an "administrative oversight" in which they failed to move for summary judgment on Plaintiffs state law discrimination and retaliation

eration of the motions, responses, replies, summary judgment evidence, record and applicable law, the court grants Excel Management Services, Inc.'s Amended and/or Supplemental Motion for Summary Judgment; and grants VarTec Telecom, Inc.'s Amended and/or Supplemental Motion for Summary Judgment.

I. Factual and Procedural Background

This is an employment discrimination and retaliation case. Plaintiff Brenda J. Owens ("Plaintiff" or "Owens"), a 52 year-old [2] African-American female, worked as Director of Corporate Tax for Defendant Excel Management Services, Inc. ("Excel") from March 13, 1995 until October 19, 2001. As such, Owens managed Excel's tax department and provided other tax related services to Excel. Owens reported to Mike Lavey, a 43 year-old white male, who was the Vice President/Controller of Excel. In addition to the tax department, Lavey had supervisory authority over the departments ofrevenue accounting, revenue operations, and treasury. Lavey reported to Jim Timmer, a 42 year-old male, who was an Executive Vice President/Chief Financial Officer for Excel. In October 2001, Excel initiated a company-wide reduction in force ("RIF"). As part of the RIF, Lavey made the decision to eliminate two positions: Director of Tax, which was held by

---

claims in their original motions. Defendants also filed supplemental appendices in which they attached the evidence necessary to support their amended motions. On November 4, 2003, Defendant Excel Management Services, Inc. filed a corrected copy of its amended summary judgment brief. On November 13, 2003, Plaintiff filed her response to Defendants' amended motions for summary judgment. On November 21, 2003, Plaintiff filed an amended response in which she attached a table of contents and a table of authorities that were inadvertently omitted from her response of November 13, 2003. On November 26, 2003, Defendants filed their amended replies.

[2] All references to age are calculated as of the date of Owens's termination, October 19, 2001.

Owens, and Revenue Specialist, which was held by Kevin Crews ("Crews"), a 32 year-old white man. On October 19, 2001, Owens's employment with Excel was terminated.

During this same time period, VarTec Telecom, Inc. ("VarTec") was in the process of acquiring Excel. As Director of Corporate Tax, Owens worked with several VarTec employees, including Sonya Ayers ("Ayers"), regarding the impending acquisition. Ayers, a 41 year-old white female, was the Vice President of Finance Integration for VarTec. After hearing of Owens's termination, Ayers informed Owens of the vacant Director of Tax position at VarTec. Shortly thereafter, Owens applied for the position. Ayers, however, was not the final decisionmaker with respect to this position. Instead, VarTec's Chief Financial Officer Gary Egger ("Egger"), a 53 year-old white male, was the decisionmaker. Egger hired Neil Keeter, a 35 year-old white male, for the vacant position.[3]

After exhausting her administrative remedies, Owens filed this lawsuit alleging claims of race, sex, and age discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e, *et seq.*; the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*; and the Texas Commission on Human Rights Act ("TCHRA"), Tex. Lab. Code Ann. § 21.001, *et. seq.*; and a claim of "aiding and abetting" in violation of § 21.056 of the Texas Labor Code. Excel and VarTec (collectively "Defendants") subsequently moved for summary judgment. The court now considers these motions.

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[3] The title of the vacant position was changed to Senior Director of Tax in order to accommodate Keeter's salary requirements. The primary duties and responsibilities of the position were not affected.

II. Summary Judgment Standard

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986); *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Ragas*, 136 F.3d at 458. Further, a court "may not make credibility determinations or weigh the evidence" in ruling on motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Anderson*, 477 U.S. at 254-55.

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 586. Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *See Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, 513 U.S. 871 (1994). The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that

evidence supports his claim. *Ragas*, 136 F.3d at 458. Rule 56 does not impose a duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.; see also Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5'h Cir.), *cert. denied,* 506 U.S. 832 (1992). "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Disputed fact issues which are "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion. *Id.* If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322-23.

III. Analysis

A. Applicable Standard of Proof

Owens and Defendants disagree regarding the applicable standard of proof on her discrimination claims. Owens maintains that the holding in *Desert Palace, Inc. v. Costa*, ___ U.S. ___, 123 S.Ct. 2148, 2150, 156 L.Ed.2d 84 (2003) dictates that "summary judgment should only be granted in employment discrimination cases if an employer can demonstrate that the employee has failed to raise a genuine issue of material fact concerning whether or not a protected characteristic was a motivating factor in an employment decision." Pl. Am. Resp. at 8. In other words, Owens contends that the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden-shifting framework is no longer applicable.

Defendants counter that *the McDonnell Douglas* burden-shifting framework is applicable despite *Desert Palace.* The court agrees. *Desert Palace* simply makes clear that direct evidence of discrimination is not necessary to obtain a mixed-motive jury instruction under Title VII. 123 S .Ct. at 2150,

2155. If Owens's suggestion that the *McDonnell Douglas* burden-shifting paradigm no longer exists after *Desert Palace* is correct, such a change would constitute a revolution in employment discrimination law. If the Supreme Court were going to make a draconian departure from 30 years of well-established employment law precedent, the court believes it would have done so with unmistakable clarity. In *Desert Palace,* the Supreme Court does not even intimate that it is overruling, restricting or clarifying *McDonnell Douglas.* Moreover, no Fifth Circuit authority embraces Owens's interpretation of *Desert Palace. See Johnson v. Louisiana,* 351 F.3d 616, 622 (5th Cir. 2003) ("Resolution of a [Title VII discrimination] claim involves a three-step, burden-shifting analysis."); *see also Read v. BT Alex Brown Inc.,* 72 Fed. Appx. 112 (5th Cir. 2003).[4] Accordingly, this case will be analyzed pursuant to the burden-shifting framework under *McDonnell Douglas.* Regardless of the standard applied, the ultimate burden of proving intentional discrimination remains with the plaintiff. *See Texas Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *see also Read*, 72 Fed. Appx. at 115 (citing *Desert Palace*, 123 S.Ct. at 2150).

B. Discrimination

Owens brings claims of race, sex, and age discrimination in violation of Title VII, §1981, THCRA, and the ADEA.[5]

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[4] In *Read,* the Fifth Circuit cited to *Desert Palace;* however, it applied the *McDonnell Douglas* burden-shifting framework to the plaintiff's sex and age discrimination claims. If the Fifth Circuit believed that *Desert Palace* abrogated the burden-shifting framework set forth in *McDonnell Douglas,* it certainly would have deemed it necessary to elevate *Read* to the status of a published opinion, rather than making it an unpublished opinion having no precedential value.

[5] The same standard of proof applies to disparate treatment claims under Title VII and § 1981 when they are urged as parallel causes of action. *Shackelford v. Deloitte & Touche, LLP.*, 190 F.3d 398, 403 n.2 (5th Cir. 1999); *Baltazar v. Holmes*, 162 F.3d 368, 373 (5th Cir. 1998); *Wallace v.*

Under the applicable burden-shifting paradigm for discrimination claims, Owens must establish *a prima facie* case of discrimination; Defendants must then articulate legitimate, nondiscriminatory reasons for their actions; and finally, if the parties satisfy their initial burdens, the case reaches the "pretext stage," and Owens must then adduce sufficient evidence to permit a reasonable trier of fact to find pretext or intentional discrimination. *See McDonnell Douglas*, 411 U.S. at 802-04; *Burdine*, 450 U.S. at 252-53; *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 425-26 (5th Cir. 2000).

1. Discharge Claim

Owens contends that she was discharged because of her race, sex, and age. Excel counters that her race, sex, and age played no part in the decision to terminate her employment; instead, she was discharged pursuant to a company-wide RIF aimed at reducing costs.

In a RIF case, *a prima facie* case under Title VII is established by showing that (1) the plaintiff is a member of a protected class; (2) she was qualified for the position that she held; (3) she was discharged; and (4) after her discharge, "others who were not members of the protected class remained in similar positions." *Bauer v. Albemarle Corp.*, 169 F.3d 962, 966 Cir. 1999) (quoting *Vaughn v. Edel*, 918 F.2d 517, 521 (5th Cir. 1990)). The first three elements of *a prima facie* case under the ADEA are identical to those of *a*

Texas Tech Univ., 80 F.3d 1042, 1047 (5th Cir. 1996). Similarly, claims under TCHRA and Title VII are governed by identical law. *Shackelford*, 190 F.3d at 403 n.2 (citing *Colbert v. Georgia-Pacific Corp.*, 995 F.Supp. 697 (N.D. Tex. 1998)). Further, *the McDonnell Douglas* burden-shifting analysis is also applicable to ADEA discrimination claims. *See O'Connor v. Consolidated Coin Caterer Corp.*, 517 U.S. 308, 311 (1996). As the underlying facts of Owens's Title VII, § 1981, TCHRA, and ADEA discrimination claims are the same, and the evidentiary burdens of these statutes are similar, her claims will be analyzed together.

prima facie case under Title VII. *Bauer*, 169 F.3d at 966 (citing *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 957 (5th Cir. 1993)). For the fourth element in an ADEA case, the plaintiff must show that she was otherwise discharged because of her age. *Id.* (citing *Armendariz v. Pinkerton Tobacco Co.*, 58 F.3d 144, 150 (5th Cir. 1995)).

(a) *Prima Facie* Case

Excel concedes that Owens can establish the first three elements of *a prima facie* case. The court, therefore, must determine whether evidence exists to establish the fourth element of Owens's race and sex claims, namely, that white males remained in similar positions, and of her age claims, namely, that she was otherwise discharged because of her age. *Meinecke v. H&R Block*, 66 F.3d 77, 84 (5th Cir. 1995).

With respect to Owens's race and sex claims, Excel contends that she cannot establish that white males remained in similar positions because there were no employees who were similarly situated to her or in nearly identical circumstances to hers. In other words, Excel contends that because Owens was the only director-level employee, or "Grade-12" employee, in the tax department, she did not have a "nearly identical" comparator, and therefore cannot establish a Title VII *prima facie* case. Owens counters that she need not show that she was treated differently than a similarly situated individual; rather, she need only present evidence that Excel intended to discriminate in reaching the decision at issue. Owens relies on *Palasota v. Haggar Clothing Co*, 342 F.3d 569 (5th Cir. 2003) to support her position; her reliance on *Palasota*, however, is misplaced.

In *Palasota*, the plaintiff brought suit against his former employer alleging age discrimination in violation of the ADEA and sex discrimination in violation of Title VII. *Id.* at 573. The jury entered a verdict in favor of the plaintiff on the ADEA claim and in favor of the employer on the Title VII

claim. *Id.* After the jury verdict, the district court granted a motion for judgment as a matter of law in favor of the employer on the ADEA claim. *Id.* The Fifth Circuit held that the district court erred in, among other things, holding that the plaintiff had to show that he was treated differently than similarly situated employees who were younger than he. *Id.* at 575. The *Palasota* court reiterated that the fourth element of an ADEA *prima facie* case provides that a plaintiff must show that he was replaced by someone outside the protected class, replaced by someone younger, or otherwise discharged because of his age. *Id.* at 576. The court explained that a plaintiff can establish that he was otherwise discharged because of his age by showing "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." *Id.* (quoting *Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 41 (5th Cir. 1996)).

Owens contends that *Palasota* applies to Title VII cases. The court disagrees. While the evidentiary burdens of the ADEA and Title VII are the same (*O'Connor*, 517 U.S. at 311), the elements of *a prima facie* case under each statute are not identical. *Bauer*, 169 F.3d at 966. The *Palasota* court specifically addresses the fourth element in *a prima facie* ADEA case; no such element exists in *a prima facie* Title VII case.

While *Palasota* is applicable to the court's determination of whether Owens can establish *a prima face* case of age discrimination, it has not yet reached this issue. At this point, the court must determine whether Owens has shown that Excel treated her differently than other similarly situated employees on the basis of race and sex. *See Vaughn*, 918 F.2d at 522. Employees maybe considered "similarly situated" to Owens if their circumstances are nearly identical. *See Okoye v. University of Texas Houston Health Sci. Ctr.*, 245 F.3d 507, 514 (5th Cir. 2001); *Little v. Republic Refining Co., Ltd.*, 924 F.2d 93, 97 (5th Cir. 1991).

Owens points to two other director-level employees, Debra Brandgard ("Brandgard") and Clarence Prestwood ("Prestwood"), who were treated differently than she. Brandgard, a 38 year-old white female, was the Director of Revenue Operations and reported to Lavey. Prestwood, a 49 year-old white male, was the Vice President of Finance and reported to Timmer. Neither Brandgard nor Prestwood worked in the tax department. Excel contends that Brandgard and Prestwood are not appropriate comparators because they were not supervised by the same person as Owens and they performed different job functions than Owens. The court agrees. *See Okoye,* 245 F.3d at 514 (citing *Little,* 924 F.2d at 97) (Employees are not in nearly identical circumstances when their actions were reviewed by different supervisors.); *Hockman v. Westward Communications, L.L.C.,* 282 F.Supp.2d 512, 527-28 (E.D.Tex. 2003) ("[E]mployees with different responsibilities, different supervisors, different capabilities, different work rule violations or different disciplinary records are not considered to be 'nearly identical.'); *Daniels v. BASF Corp.*, 270 F.Supp.2d 847, 854-55 (S.D.Tex. 2003) (Circumstances were not nearly identical when employees did not perform the same functions.). Indeed, Owens failed to establish that she, Prestwood, and Brandgard performed the same or nearly identical functions. Moreover, it is undisputed that Prestwood and Owens were supervised by different persons. Accordingly, Owens cannot demonstrate that she was similarly situated to these employees and therefore cannot establish *a prima facie* case of sex and race discrimination.[6]

As for *a prima facie* case of age discrimination, Owens need only show evidence that Excel intended to discriminate in reaching its decision to eliminate her position during the RIF. *See Palasota*, 342 F.3d 576; *Nichols*, 81 F.3d at 41.

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[6] Even assuming that Owens can establish *a prima facie* case, her race and sex discrimination claims fail for the same reasons her age discrimination claims fail. *See* § II.B(1)(c), *infra.*

This requires only a minimal showing. *Nichols*, 81 F.3d at 41. Excel contends that Owens cannot show evidence that it intended to discriminate by eliminating her position because Lavey also terminated a 32 year-old employee, Crews, and he retained an employee[7] who "was nearly as old as" Owens. Owens counters that (1) she was the oldest employee in the tax department and was the only employee from that department terminated; (2) she was the oldest employee who reported to Lavey; (3) Brandgard and Prestwood, both of whom are younger than she, were originally selected for termination in the RIF but were ultimately retained; (4) her performance evaluations were better than those of Brandgard and Prestwood; and (5) the costs savings associated with her termination would have been less than those costs savings associated with Prestwood had he been terminated; and almost the same, albeit a little higher, than those costs savings associated with Brandgard had she been terminated. Evidence that younger employees were treated more favorably is generally sufficient to shift the burden to the employer in the second stage of the *McDonnell Douglas* framework. The court therefore concludes that Owens has met her initial burden of establishing the elements of *a prima facie* age discrimination case.

(b) Legitimate, Nondiscriminatory Reason

Excel contends that its company-wide RIF, which affected 166 employees and was projected to save 17.2 million dollars in 2002, is a legitimate, nondiscriminatory reason for terminating Owens. Specifically, Lavey decided that "Excel could most safely eliminate Owens's management-level position to cut costs while utilizing the existing staff to maintain the same level of work." Excel. Am. Br. at 18-19. The rebuttal of the presumption created by the *prima facie* case requires only a minimal showing, as does the *prima facie* case itself.

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[7] The employee is Lewis Thomas. He was 52 years old.

Amburgey, 936 F.2d at 813. The court concludes that Excel has set forth a legitimate, nondiscriminatory reason for terminating Owens. *See EEOC v. Texas Instruments, Inc.*, 100 F.3d 1173, 1181 (5th Cir. 1996) (A reduction in force "is itself a legitimate, nondiscriminatory reason for discharge.").

(c) Pretext and Intentional Discrimination

Owens contends that Excel's proffered reason for eliminating her position in the RIF is a pretext. A "plaintiff can survive summary judgment by producing evidence that creates a jury issue as to the employer's discriminatory animus or the falsity of the employer's legitimate nondiscriminatory explanation." *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir. 2002). "Pretext-plus" is not required to support an inference of discrimination. *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 223 (5th Cir. 2000). "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated," and may therefore be enough to prevent summary judgment or judgment as a matter of law. *See Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 148 (2000); *Sandstad*, 309 F.3d at 897. This showing, however, is not always enough to prevent summary judgment "if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Reeves*, 530 U.S. at 148.

To show pretext, Owens contends that (1) Excel's proffered reason for eliminating her position is different than the reason she was given at the time of her termination; (2) Excel's statements and actions are inconsistent with its financial condition; and (3) Excel's actions with respect to

retention, hiring and compensation of employees before and after the RIF are inconsistent. Specifically, Owens avers that Lavey told her at the time of her termination that her position was being eliminated because of the VarTec acquisition. Owens offers Lavey's deposition, in which he denies such an assertion and concedes that such an assertion would be false. Further, Owens provides deposition testimony of Lavey and Timmer in which they contradict each other regarding the discussions leading up to the RIF.[8]

Excel counters that summary judgment is appropriate because its proffered reason is the same reason Owens was given on the day of her termination, namely, that her position was no longer needed, and it is undisputed that Owens was terminated pursuant to a company-wide RIF. The court agrees. Even assuming that Lavey told her that her position was being eliminated because of the VarTec acquisition and that Lavey and Timmer have different recollections of the discussions they had regarding the RIF, the record conclusively reveals a nondiscriminatory reason for Owens's termination, namely, the company-wide RIF.

Owens next attempts to show pretext by questioning the necessity of the RIF based on Excel's financial condition at that time and various personnel and compensation decisions made before and after the RIF. Specifically, she points to two internal documents issued shortly before the October RIF that state that Excel was on target to meet its business goals. Based on this evidence, Owens contends that "the evidence clearly shows that the RIF was not expected to solve [Excel's financial] problems." In this same vein, Owens points out that, even after the RIF, Excel continued to hire employees[9]

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[8] The inconsistent testimony deals with the information allegedly given by Timmer to his direct reports, including Lavey, regarding the objective of the RIF and the directive to reduce costs; it does not deal specifically with the decision to eliminate Owens's position.

[9] It is undisputed that none of these employees replaced Owens.

and pay bonuses. Assuming that the RIF was an unwise and unnecessary business decision, a court cannot and will not second-guess a company's decision to undergo a RIF. *See Walton v. Bisco Indus., Inc.*, 119 F.3d 368, 372 (5th Cir. 1997); *Nieto v. L&H Packing Co.*, 108 F.3d 621, 624 (5th Cir. 1997).

Finally, Owens compares her treatment to that of Brandgard and Prestwood, both of whom are younger than she. Specifically, she questions why Brandgard and Prestwood, whose combined salaries were over $310,000, were not terminated, as their positions had been initially identified for elimination. She contends that if cost reduction were the true reason behind the RIF, the elimination of their positions would have saved more money than the elimination of her position. Owens further contends that her performance was superior to that of Brandgard, as Brandgard overstated Excel's revenue in 2000 by $136 million while she (Owens) brought in an additional $35 million in the same time period. Even if the terminations of Brandgard and Prestwood would have saved Excel more money and if her performance was superior to that of Brandgard, Owens has not produced any evidence to dispute Lavey' s reason for choosing to eliminate her position, namely, that he could cut costs while using the existing staff to maintain the same level of work. Indeed, it is undisputed that there was little to no disruption in the work performed within the tax department after Owens's termination. Furthermore, Owens has not disputed Lavey's reason for not eliminating Brandgard's position, namely, she was working on a project that needed to be completed before the position could be eliminated. Lastly, there is no evidence to suggest that Lavey had the authority to eliminate Prestwood's position, as they were both Vice Presidents of Excel. Thus, Owens has not presented sufficient evidence to create a genuine issue of material fact as to pretext. Accordingly, there is no genuine issue of material fact as to Owens's age discrimination claims based on her termination, and Excel is entitled to judgment as a matter of law as to those claims.

2. Failure to Hire

Owens contends that VarTec discriminated against her on the basis of race, sex, and age when it failed to hire her for the position of Director of Tax. VarTec counters that she was not hired for the position because she was not qualified.

In a failure to hire case, a *prima facie* case is established by showing that (1) Owens is a member of a protected class; (2) she applied for a position; (3) she was qualified for the position for which she applied; (4) she was not selected for the position; and (5) after VarTec declined to hire her, the position either remained open or someone outside the protected group was selected to fill it. *See Davis v. Chevron U.S.A., Inc.*, 14 F.3d 1082, 1087 (5th Cir. 1994) (citing *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1135 (5th Cir.1983)).[10]

(a) *Prima Facie Case*

VarTec contends that Owens cannot establish that she was qualified for the Director of Tax position, as she was not a Certified Public Accountant ("CPA"). Specifically, VarTec's job description of the position at issue lists a CPA license as a requirement, and the individual, Keeter, who was selected for the position is a CPA. Owens concedes that she does not have a CPA license but counters that a genuine fact question exists as to whether she was qualified for the position because (1) two VarTec employees involved in the hiring process believed she was qualified; (2) she was granted an interview by a VarTec recruiter, which ordinarily does not happen unless the individual is qualified for the position; (3) the individual who held the position prior to the vacancy was not a CPA; and (4) she was never informed during the hiring process that she was not qualified.

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[10] The court will again analyze all of Owens's discrimination claims together. *See* n.5, *supra*.

VarTec does not contend that Owens "was not capable of performing the essential functions of the job." It contends that she did not meet the "facial requirements" of the job description for the position. The court therefore determines that VarTec's concession that Owens was capable of performing the essential functions of the job is sufficient to establish that she was qualified for the position. *See Smith v. Eastern Airlines, Inc.*, 651 F.Supp. 214, 219 n.1 (S.D.Tex. 1986) ("Here the term 'qualified' simply means an essential ability to perform the job, not that Plaintiff met the job description required by the employer.").

VarTec next contends that Owens cannot establish that she was rejected for the position because it did not make an affirmative decision not to hire her but rather it made an affirmative decision to hire Keeter. VarTec's contention is a "difference without a distinction." The fourth element of *a prima facie* case, as articulated earlier, requires a showing that Owens was not selected ' for the position. As Keeter was given the position, it is clear that Owens was not selected for the position. The court therefore concludes that Owens has met her initial burden of establishing the elements of *a prima facie* case.

(b) Legitimate, Nondiscriminatory Reason

VarTec contends that Egger, the ultimate decisionmaker, hired Keeter because of "his previous, positive work history with Keeter, Keeter's VarTec-specific experience, Keeter's "Big 5" accounting experience, and Keeter's otherwise exemplary qualifications and experience." VarTec Am. Reply at 4. Owens counters that VarTec has not articulated a legitimate reason for not selecting her, as it never compared her qualifications to those of Keeter's. VarTec concedes that no comparison was done because "Keeter was not selected over Owens." VarTec Am. Reply at 5. Instead, the decision to hire Keeter, VarTec continues, was made before Owens could

be considered for the position. Although it appears that Owens was not considered for the position, the court determines that VarTec has articulated legitimate, nondiscriminatory reasons for hiring Keeter. *Cf. Wheeler v. City of Columbus,* 686 F.2d 1144, 1153-54 (5th Cir. 1982) (court analyzed employer's refusal to interview the plaintiff thus barring her from consideration in the pretext stage of the burden-shifting framework). The burden now shifts back to Owens to demonstrate that VarTec's articulated reasons are a pretext for intentional discrimination.

(c) Pretext and Intentional Discrimination

Owens contends that VarTec's proffered reasons are pretext because she was never considered for the position and she is more qualified than Keeter for the position. VarTec counters that Owens was not considered for the position because Egger "was focused on the possibility of hiring Keeter." VarTec Am. Br. at 11. Owens contends that VarTec's explanation is disingenuous, as she applied for the position before Keeter. Although this may be unfair, it alone is insufficient to establish that VarTec's failure to hire her is based on impermissible discrimination. Indeed, it is undisputed that at the time the decision to hire Keeter was made, Egger was unaware of Owens's race or age.

VarTec further contends that it is entitled to summary judgment because Owens fails to establish that no reasonable person would have chosen Keeter over her for the position in question. The court agrees. At the time of his hire, Keeter had over 15 years of public accounting experience, including over 10 years in a manager or senior manager capacity; he has a B.B.A. in accounting; he is a CPA; he had 14 years of "Big 5" experience; and he had VarTec-specific telecom experience. On the other hand, Owens had over 30 years experience in corporate taxation, including 20 years in a supervisory position; she has a B.S. in accounting and an

M.S. in taxation; she had seven years of experience in corporate tax in the telecom industry and worked in a regulated environment for 11 years; and she was the Director of Tax at Excel for over six and a half years. Obviously, both Keeter and Owens are well-qualified for the position at issue. The disparities in their qualifications are not of "such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen" Keeter over Owens for the position. *See Deines v. Texas Dep't of Protective and Regulatory Servs.*, 164 F.3d 277, 280-81 (5th Cir. 1999).

The court determines that Owens has failed to establish that VarTec's articulated reasons for its alleged discriminatory conduct were a pretext for intentional discrimination. Accordingly, VarTec is entitled to judgment on Owens's claims of race, age, and sex discrimination.

3. Aiding and Abetting

In her Second Amended Complaint, Owens alleges violations of § 21.056 of the Texas Labor Code. Section 21.056 provides that "[a]n employer . . . commits an unlawful employment practice if the employer . . . aids, abets, incites, or coerces a person to engage in a discriminatory practice." Tex. Labor Code Ann. § 21.056 (Vernon 1996). Excel and VarTec move for summary judgment on the basis that the record is devoid of any evidence to support a violation of § 21.056. The court agrees. Moreover, Owens does not oppose summary judgment on her § 21.056 claims. *See Pl. Am.* Br. at 2 ("Owens had also alleged that Excel and VarTec aided and abetted each other in violation of Tex. Labor Code § 21.056; however, Owens is not opposing summary judgment on the aiding and abetting claims."). Accordingly, Excel and VarTec are entitled to judgment as a matter of law on Owens's § 21.056 claims.

C. Retaliation

Owens brings a retaliation claim pursuant to Title VII, THCRA, ADEA, and § 1981 against VarTec.[11] Specifically, Owens contends that VarTec retaliated against her by failing to hire her for the Director of Tax position because she had previously complained to Excel regarding sex, race, and age discrimination. VarTec counters that Owens cannot establish *a prima facie* case or show that "but for" her protected activity, she would have been hired for the Director of Tax position.

The *McDonnell Douglas* burden-shifting framework is also applicable to retaliation claims. *Montemayor v. City of San Antonio*, 276 F.3d 687, 692 (5th Cir. 2001). To establish a *prima facie* case of retaliation, a plaintiff must demonstrate that: (1) she engaged in a protected activity; (2) she experienced an adverse employment action following the protected activity; and (3) a causal link existed between the protected activity and the adverse employment action. *Id.; Mota v. University of Texas Houston Health Sci. Ctr.*, 261 F.3d 512, 519 (5th Cir. 2001). The burden of production then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action. *Id.* Once the defendant does so, the inference of discrimination created by the *prima facie* case disappears, and the ultimate question becomes whether the protected conduct was the "but for" cause of the adverse employment action.[12] *Id.*

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[11] As the underlying facts of Owens's Title VII, § 1981, TCHRA, and ADEA retaliation claims are the same, and the evidentiary burdens of these statutes are similar, her claims will be analyzed together. *See* n.5, *supra*.

[12] Owens contends that the less stringent "motivating factor" test applies to her THCRA claim. She relies on *Quantum Chemical Corp. v. Toennies*, 47 S.W.3d 473 (Tex. 2001); her reliance *on Toennies is* misplaced. In *Pineda v. United Parcel Serv., Inc.*, 353 F.3d 414 (5th Cir. 2003), the Fifth Circuit rejected this argument. Specifically, the *Pineda* court noted that the *Toennies* court "meant that the [motivating factor] standard was the

At issue here is the third element of the *prima facie* case—the existence of a causal connection between the protected activity and the adverse employment action. VarTec contends that Owens cannot establish a causal connection because Egger, the ultimate decisionmaker, had no knowledge of her complaints of discrimination when he made his decision to hire Keeter. Owens contends that she need only establish general corporate knowledge of her protected activity, not specific knowledge by an individual employee of VarTec. She relies on *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111 (2d Cir. 2000). Owens's reliance on *Gordon* is misplaced.

First, *Gordon* is not binding on this court, as it was decided in another circuit. Second, the holding in *Gordon* actually supports VarTec's position that the lack of knowledge on the part of Egger is evidence of a lack of a causal connection. Specifically, the *Gordon* court held, among other things, that "[t]he lack of knowledge on the part ofparticular *individual agents* is admissible as some evidence of a lack of causal connection, countering plaintiff's circumstantial evidence of proximity or disparate treatment." *Id.* at 117 (emphasis in original).[13]

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applicable standard in both pretext and mixed motive employment discrimination cases where § 21.125(a) *was applicable." Id.* at 419 n.4 (emphasis added). The *Pineda* court then held that the "but for" standard is the correct standard for claims brought under § 21.055, as § 21.125(a), by its own terms, is not applicable to claims brought under § 21.055. *Id.* at 419. The court, therefore, applies the "but for" standard to Owens's THCRA claim.

[13] The *Gordon* court noted, however, that even in the absence of direct knowledge by individual agents, a jury can still find retaliation if, for example, it finds that "circumstances evidence knowledge of the protected activities or the jury concludes that an agent is acting explicitly or implicit upon the orders of a superior who has the requisite knowledge." 232 F.3d at 117. No such evidence has been presented in this case.

Owens further contends that the timing of Keeter's hire is sufficient to establish a causal connection. Specifically, VarTec was notified of Owens's complaint on January 16, 2002, the same day that it sent Keeter a written offer of employment. Owens is correct that temporal proximity between the protected activity and the adverse employment action may be a significant factor in showing a causal connection. *See Evans v. City of Houston*, 246 F.3d 344, 356 (5th Cir. 2001). She must still, however, demonstrate that the decision not to hire her was based in part on knowledge of her complaints of discrimination. *See Medina v. Ramsey Steel Co.*, 238 F.3d 674, 684 (5th Cir. 2001) (citing *Sherrod v. American Airlines*, 132 F.3d 1112, 1122 (5th Cir. 1998)). "If the decisionmakers were completely unaware of the plaintiff's protected activity, then it could not be said (even as an initial matter) that the decisionmakers might have been retaliating against the plaintiff for having engaged in that activity." *Manning v. Chevron Chemical Co.*, 332 F.3d 874, 884 n.6 (5th Cir. 2003).

Here, it is undisputed that Eggers did not know of Owens's protected activity when he interviewed Keeter and that Eggers had decided as early as December 13, 2001 that he wanted to hire Keeter for the vacant position. Indeed, the hiring requisition form for the position in question, dated January 8, 2002, identifies Keeter and sets forth his salary requirements. Owens has not adduced any evidence that any VarTec decisionmaker had knowledge of her protected activity when she was not selected for the vacant position. As such, Owens has not established *a prima facie* case of retaliation.[14]

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[14] Even assuming Owens established *a prima facie* case of retaliation, VarTec provided a legitimate, nonretaliatory reason for not hiring her for the Director of Tax position, namely, the decision to hire Keeter was made before she could be considered for the position. *See* § M.B.2, *supra.* Owens has not offered sufficient evidence to demonstrate that the reason she was not hired was in retaliation for complaining to Excel regarding discrimination.

IV. Conclusion

For the above stated reasons, no genuine issues of material fact exist with respect to any of Owens's claims, and Defendants are entitled to summary judgment on these claims. Accordingly, the court grants Defendant Excel Management Services, Inc.'s Motion for Summary Judgment; and grants Defendant VarTec Telecom, Inc.'s Motion for Summary Judgment. The court dismisses with prejudice this action against Defendants. Judgment will issue by separate document as required by Fed. R. Civ. P. 58.

It is so ordered this 13th day of February, 2004.

/s/ Sam A. Lindsay
SAM A. LINDSAY
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
D. MINNESOTA

No. CIV.02-1014 JRT/FLN

DENNIS ORDAHL,

Plaintiff,

v.

FORWARD TECHNOLOGY INDUSTRIES, INC.,

Defendant.

Feb. 4, 2004.

MEMORANDUM OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TUNHEIM, *District J.*

Plaintiff Dennis Ordahl ("Ordahl") was employed by defendant Forward Technology Industries, Inc. ("FTI") as a machinist until his employment was terminated in August 2000. Ordahl claims that he was unlawfully terminated by FTI in violation of the Americans with Disabilities Act (the "ADA") and the Minnesota Human Rights Act ("MHRA"). FTI asserts that Ordahl is not disabled and was never regarded or treated as disabled as that term is defined in the ADA. FTI further argues that Ordahl's employment was terminated for legitimate reasons and that even if Ordahl had remained employed at FTI, his employment would necessarily have been terminated on May 31, 2000 when the Plymouth facility where Ordahl worked was closed. They therefore request that any potential damages be limited accordingly.

I. BACKGROUND

At age 15 Ordahl suffered an accident that severed his vena cava vein and resulted in the amputation of his left hand and part of his arm. As a result of these injuries, Ordahl uses a prosthetic hand and suffers from a circulatory condition known as venous stasis disease.[1] Both conditions are permanent. According to Ordahl, his amputation affects his ability to bathe, dress, eat, grasp, and perform actions requiring manual dexterity, participate in recreational activities such as sports, and engage in physical touching and sexual activity. Ordahl's circulatory condition affects his ability to walk, stand, sit, and participate in recreational activities.

Ordahl was first employed by FTI in 1979 as a machinist, at which time Ordahl informed FTI of his impairments. According to Ordahl, during his tenure at FTI he worked on a variety of machines performing all of the main machining functions, and at the time of his dismissal was capable of operating any machine in the workshop. In 1998, FTI began purchasing new, more sophisticated machines that required less manual operation and more computer programming skill. According to Ordahl, he repeatedly requested computer training on the new machines, particularly the 'Tacumi,' but was turned down by management. According to Ordahl and a former FTI manager, the management did not think that Ordahl was a good candidate to operate the new machines because he did not have two hands. Eventually, shortly before

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[1] The inferior vena cava vein is the largest vein in the human body, and returns blood to the right atrium of the heart from the lower body parts. 6 J.E. Schmidt, *Attorneys' Dictionary of Medicine and Word Finder* V-52 (2002). Venous stasis is a circulatory condition causing stagnation of blood in the veins. *Id.* at V-71.

he was terminated, management offered Ordahl part time computer related training.[2]

In 2000, FTI was sold to new owners who instituted a number of cost-cutting measures including extensive layoffs, closure of the Plymouth facility that Ordahl worked at, and outsourcing of various kinds of work. According to FTI, Ordahl's department, the machining department, had three product lines. With the close of the Plymouth facility, two of the product lines, cleaning and ultrasonic, were either outsourced or eliminated, and the relevant employees terminated. The remaining line, plastic welding, moved to a new facility in Cokato.

FTI terminated Ordahl's employment on August 8, 2000, allegedly for violating a company policy against working on personal projects at work while still on the clock. Ordahl denies having violated the policy, and asserts that his termination was improperly motivated by his disability.

II. ANALYSIS

A. Standard of Review

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

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[2] Specifically, Ordahl received 30 minutes of CAD/CAM training from a fellow employee each day for several weeks. It appears from the record that this training would have been useful in operating existing machines and might also have been one step towards operating the new machines. However, more training would have been required in order for Ordahl to operate the new machines. After several weeks, workload at the company increased to a point where neither Ordahl nor the trainer-employee could afford to spend 30 minutes on training.

Fed.R.Civ.P. 56. Only disputes over facts that might affect the outcome of the suit under the governing substantive law will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Summary judgment is not appropriate if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id*. Summary judgment is to be granted only where the evidence is such that no reasonable jury could return a verdict for the nonmoving party. *Id.*

The moving party bears the burden of bringing forward sufficient evidence to establish that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmoving party is entitled to the benefit of all reasonable inferences to be drawn from the underlying facts in the record. *Vette Co. v. Aetna Casualty & Surety Co.*, 612 F.2d 1076, 1077 (8th Cir.1980). However, the nonmoving party may not merely rest upon allegations or denials in its pleadings, but it must set forth specific facts by affidavits or otherwise showing that there is a genuine issue for trial. *Forrest v. Kraft Foods, Inc.*, 285 F.3d 688, 691 (8th Cir.2002).

B. ADA

The ADA prohibits employers from discriminating against any "qualified individual with a disability" because of that disability. 42 U.S.C. § 12112(a). Where, as here, a plaintiff alleges discriminatory disparate treatment,[3] the Court applies the familiar burden-shifting framework first articulated in

[3] In the complaint, Ordahl alleges disparate treatment, refusal to accommodate, retaliation, and improper termination. The record and the arguments of the parties, however, make clear that this case focuses on disparate treatment.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Fenney v. Dakota, Minnesota & Eastern Railroad Co.*, 327 F.3d 707, 711-12 (8th Cir.2003). Under this framework, the plaintiff initially bears the burden of establishing each element of the prima facie case. *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1134 (8th Cir.1999) (en banc). The second step of the analysis requires the employer to "rebut the presumption of discrimination by articulating a legitimate, non-discriminatory reason for the adverse employment action." *Id.* at 1135. The third step traditionally "shifts [the burden] back to the plaintiff to demonstrate that the employer's non-discriminatory reason is pretextual." *Id.*

In *Desert Palace, Inc. v. Costa,* the Supreme Court analyzed 42 U.S.C. § 2000e-2(m), part of the 1991 Civil Rights Act, and concluded that a Title VII plaintiff need not present direct evidence of discrimination in order to either obtain a mixed-motive jury instruction or to establish liability in a mixed motive case. 539 U.S. 90, ___ - ___, 123 S.Ct. 2148, 2154-55, 156 L.Ed.2d 84 (2003). As this Court noted in *Brown v. Westaff (USA), Inc.*, 2004 WL 67654 (D.Minn.2004), courts have attempted to discern the potential broader impact of *Desert Palace,* and have come to multiple conclusions. Some courts have persuasively reasoned that *Desert Palace* requires that the *McDonnell Douglas* framework be dropped in favor of the more straightforward process laid out in § 2000e-2(m). *See, e.g., Dare v. Wal-Mart Stores, Inc.*, 267 F.Supp.2d 987, 990-93 (D.Minn.2003). Noting that multiple federal anti- discrimination laws are patterned after Title VII and are evaluated similarly, this reasoning has been extended to other contexts, including the ADA. *LeClair v. Wells Fargo Bank Iowa, N.A.*, 291 F.Supp.2d 873, 879-80 (S.D.Iowa 2003) (following *Skomsky v. Speedway SuperAmerica, L.L.C.*, 267 F.Supp.2d 995, 998-1000 (D.Minn.2003)).

Other courts have determined that *Desert Palace* requires that *McDonnell Douglas* be modified, but not abandoned completely. *See Brown v. Westaff,* 2004 WL 67654, at *4-5; *Dunbar v. Pepsi-Cola General Bottlers of Iowa, Inc.*, 2003 WL 22290229, *13-15 (N.D.Iowa 2003); *see also Rishel v. Nationwide Mut. Ins. Co.*, 2003 WL 23112666. *8-9 (M.D.N.C.2003) (following *Dunbar* in ADA context).

The Eighth Circuit has declined to reach the issue of whether *Desert Palace* alters the *McDonnell Douglas* burden-shifting analysis and continues to apply *McDonnell Douglas. See Allen v. City of Pocahontas*, 340 F.3d 551, 558 n. 5 (8th Cir.2003) ("Without reaching the issue as to whether the Supreme Court's refocus on the statutory language of the Civil Rights Act of 1991 alters the burden-shifting analysis of *McDonnell Douglas,* the result in this case remains the same."); *see also Raytheon Co. v. Hernandez*, ___ U.S. ___, 124 S.Ct. 513, ___ L.Ed.2d ___ (2003) (noting that *McDonnell Douglas* is properly applied to disparate treatment cases under the ADA); *Peebles v. Potter*, 354 F.3d 761, 2004 WL 35070 (8th Cir.2004) (same).

As explained more fully in *Brown v. Westaff,* this Court believes that *Desert Palace* necessitates modifying the third step of the *McDonnell Douglas* framework "so that it is framed in terms of whether the plaintiff can meet his or her ultimate burden to prove intentional discrimination, rather than in terms of whether the plaintiff can prove pretext." 2004 WL 67654, * 4-5 (quoting *Dunbar*, 2003 WL 22290229, at *15). In other words, in order to survive summary judgment under the *McDonnell Douglas* analysis, a plaintiff is no longer limited to demonstrating pretext, i.e. that the defendant's asserted reason was false. Rather, at step three, a plaintiff need only present sufficient evidence, of any type, for a jury to conclude that the plaintiff's disability was a

"motivating factor" for the employment action, even though the defendant's legitimate reason may also be true or have played some role.

1. Ordahl's prima facie case

To establish a prima facie case of discrimination under the ADA, a plaintiff must show (1) that he has a disability within the meaning of the ADA, (2) that he is qualified to perform the essential functions of his job, with or without reasonable accommodation, and (3) that he suffered an adverse employment action because of his disability. *Kiel*, 169 F.3d at 1135. FTI does not appear to dispute that Ordahl is qualified, or that he suffered an adverse employment action, namely termination. Thus, the key inquiry is whether Ordahl is disabled as that term is defined under the ADA.

The ADA offers several definitions of "disability," including "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual . . ."[4] 42 U.S.C. § 12102(2)(A). FTI does not dispute that Ordahl's amputation and circulatory disease qualify as physical impairments. *See* 29 C.F.R. § 1630.2(h). However,

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[4] The ADA fully defines a "disability" as either:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (1994). Ordahl also asserts that he meets subparts (B) and (C). Because the Court finds that Ordahl raises a question of material fact as to whether he is disabled under subsection (A), the Court does not address this contention. However, the Court notes that the evidence in the record indicating that Ordahl, despite his experience and positive work evaluations, was not, at least initially, considered a candidate to operate the new machines purchased by FTI appears sufficient to create a question of material fact as to whether FTI regarded Ordahl as impaired and to raise an inference of discriminatory treatment.

FTI strongly disputes whether those impairments substantially limit any of Ordahl's major life activities.

Caring for oneself, performing manual tasks, walking, seeing, hearing, breathing, learning, and working all qualify as major life activities. 45 C.F.R. § 84.3(j)(2)(ii); *see also Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 195, 122 S.Ct. 681, 151 L.Ed.2d 615 (2002); *Fenney*, 327 F.3d at 714. Sitting, standing, lifting, and reaching have also been found to be major life activities. *Fjellestad v. Pizza Hut of America, Inc.*, 188 F.3d 944, 948 (8th Cir.1999). Ordahl alleges that his impairments affect, among other things, his ability to care for himself, perform manual tasks, walk, sit, and stand.

An individual is "substantially limited" by his impairment if the impairment "prevents or severely restricts" his ability to accomplish a major life activity, as compared to the way in which unimpaired individuals normally accomplish the same major life activity.[5] *Fenney*, 327 F.3d at 714- 15 (quoting *Toyota,* 534 U.S. at 198). Ordahl testified in deposition and stated in his affidavit that the activities of dressing, bathing, and carrying plates and glasses are substantially more difficult with his amputated hand/prosthesis than those activities were prior to the amputation. According to Ordahl, dressing himself takes twice as long as it would an unimpaired person. Ordahl also testified that his circulatory condition prevents him from either sitting or standing still for very long. The condition periodically causes ulcerated sores on his legs that make walking difficult and painful.

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[5] This standard applies to all major life activities except the major life activity of working, which requires a separate analysis. *Fenney*, 327 F.3d at 715, n. 15 (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999)). Ordahl does not allege that he is substantially restricted in his ability to work.

Additionally, the need to care for the sores on his legs and attendant pain lengthens the amount of time it takes him to care for himself in the morning.

FTI has presented substantial evidence of the degree to which Ordahl has managed to overcome and compensate for his impairments. He has maintained a full-time job for many years, has friends and a family, and leads what is, in many ways, a 'normal' life. FTI asserts that all of this evidence indicates that Ordahl cannot be considered disabled under the ADA.

The Court disagrees. The ADA does not require that a plaintiff demonstrate total inability to perform daily activities in order to be considered disabled. Rather, the central inquiry is whether, when compared to the activities of a non-impaired person, the plaintiff is substantially restricted in his ability to perform those same activities.

The Eighth Circuit's recent opinion in *Fenney* is instructive. In *Fenney,* the Eighth Circuit determined that a plaintiff with a damaged hand and arm who presented evidence that it took him twice as long to perform "taking care of himself tasks" such as bathing, shaving, preparing a meal, dressing, and going to the restroom had presented sufficient, albeit thin, evidence "that his impairment severely restricted his ability to care for himself compared with how an unimpaired individual would normally care for himself or herself in daily life." 327 F.3d at 715-16. The court noted that the defendant had failed to offer contradicting evidence and found that Fenney's evidence, viewed in the light most favorable to him, created a reasonable inference from which an issue of material fact could be drawn concerning the extent to which his impairment limited his ability to care for himself. *Id.*

FTI argues that this case is distinguishable from *Fenney* because it, unlike the *Fenney* defendant, has presented evidence contradicting Ordahl's claims of disability. Its argu-

ment is inapposite. None of the evidence presented by FTI necessarily contradicts Ordahl's statements concerning the difficulty with which he carries out his major life activities. That Ordahl, through sheer force of will, learned accommodations, and careful planning, is able to perform a wide variety of activities despite his physical impairments does not mean that those activities are not substantially more difficult for him that they would be for an unimpaired individual. The Court therefore finds that Ordahl has successfully made out a prima facie case of discrimination under the ADA.

2. FTI's legitimate reason

In order to meet its burden, "[t]he defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the employment action." *St. Mary's Honor Center*, 509 U.S. 502, 507, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) (internal quotation marks and citation omitted). FTI asserts, and has presented evidence, that Ordahl was dismissed for working on a personal project, at work, while still on the clock, without permission. According to FTI, this is against company policy. The Court is satisfied that FTI has met its burden of presenting a facially non-discriminatory reason for Ordahl's termination.

3. Ordahl's ultimate burden

In this final stage, Ordahl must present sufficient evidence that a reasonable jury could conclude that his disability was a motivating factor in his termination. One means of doing so would be to prove that the defendant's asserted legitimate reason for the action was false, or merely a pretext. Thus, evidence sufficient to demonstrate pretext under the traditional *McDonnell Douglas* analysis, will also be sufficient

under the modified version, even where evidence indicates that the defendant's asserted legitimate reason is at least partly true.

Evidence relevant to a finding of pretext might include that similarly situated unimpaired employees were treated differently, the employer's treatment of the employee during his employment, or the employer's general policy and practice regarding disabled employees. *McDonnell Douglas*, 411 U.S. at 804.

As discussed above, Ordahl has provided evidence that working on personal projects at work was common among the machinists, but no unimpaired employee had been terminated, or even disciplined, for doing so. Additionally, Ordahl has presented testimony that FTI managers considered his prosthesis an impediment to operating new machinery acquired by the company. Taking this evidence in the light most favorable to the plaintiff, as the Court must, Ordahl has presented evidence sufficient to create a triable question as to whether the reasons presented by FTI for his termination were a pretext for an unlawful discriminatory action, and to permit a reasonable jury to conclude that Ordahl's disability was a motivating factor in his termination by FTI. The Court therefore denies FTI's motion for summary judgment on the ADA claim.

C. MHRA

The MHRA largely parallels the ADA, *Maziarka v. Mills Fleet Farm, Inc.* 245 F.3d 675, 678 n. 3 (8th Cir.2001), with one exception. Under the MHRA, a person is considered disabled if he "(1) has a physical, sensory, or mental impairment which *materially* limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment." Minn.Stat. § 363A.03, subd. 12 (emphasis added). A "material" limitation is different from and less stringent than the "sub-

stantial" limitation required by the ADA. *Hoover v. Norwest Private Mortg. Banking*, 632 N.W.2d 534, 543 (Minn.2001) (citing *Sigurdson v. Carl Bolander & Sons, Co.*, 532 N.W.2d 225, 228 & n. 3 (Minn.1995)). In light of the above conclusion that Ordahl has met the more stringent federal standard, the Court also finds that Ordahl has met his burden with respect to his MHRA claim and that summary judgment is therefore inappropriate.

D. Damages

A prevailing claimant under the ADA is presumptively entitled to compensatory damages in the form of back pay that would have accrued from the termination date to the entry of judgment. 42 U.S.C.A. §§ 12101 *et seq; see also Forshee v. Waterloo Industries, Inc.*, 178 F.3d 527, 530-31 (8th Cir.1999). A prevailing claimant may also be entitled to equitable relief, including front pay, designed to address the claimant's equitable needs, "including the ability to obtain employment with comparable compensation and responsibility." *Ollie v. Titan Tire Corp.*, 336 F.3d 680, 687 (8th Cir.2003).

FTI contends that it had eliminated most positions at its Plymouth facility including Ordahl's former position and, indeed, his entire department by May 31, 2002. FTI asserts that Ordahl could not have been employed by FTI after that date and therefore is not, as a matter of law, entitled to back pay following that date or to any front pay. Ordahl responds that as of August 15, 2002, FTI still had thirteen employees in the machining, tooling, and ultrasonic areas, albeit in Cokato.[6] Ordahl testified that he was capable of working in any of those areas. In light of Ordahl's more than twenty-year history at FTI, and the evidence that some jobs apparently fitting Ordahl's skills were transferred to Cokato but not

[6] Cokato is approximately 40 miles from Plymouth.

eliminated, the Court cannot find as a matter of law that had Ordahl remained employed by FTI he would not have been one of the experienced, senior employees asked to move from the Plymouth facility to the new Cokato facility. *See Forshee*, 178 F.3d at 530-31 (finding that damages for time period after termination of all temporary employees was adequately supported by speculative theory that temporary employee might have been hired as full-time employee). Without more conclusive evidence to the contrary, the Court finds that Ordahl has established a genuine issue of material fact as to whether he actually would have been terminated on May 31, 2002, precluding summary judgment limiting any possible damage award.

ORDER

Based on the foregoing, all the records, files, and proceedings herein, IT IS HEREBY ORDERED that defendant's motion for summary judgment [Docket No. 18] is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
N.D. TEXAS, DALLAS DIVISION

No. Civ.A.3:02-CV-1591-L

NIXON WINTER,

Plaintiff,

v.

BANK OF AMERICA, N.A.,

Defendant.

Dec. 12, 2003

ORDER

LINDSAY, *J*.

Before the court are Defendant Bank of America, N.A.'s Motion for Summary Judgment, filed May 28, 2003; and Plaintiff's Motion for Partial Summary Judgment on Liability, filed September 19, 2003. After careful consideration of the motions, responses, replies, summary judgment evidence, record and applicable law, the court grants in part and denies in part Defendant Bank of America, N.A.'s Motion for Summary Judgment; and denies Plaintiff's Motion for Partial Summary Judgment on Liability.

I. *Factual and Procedural Background*

This is an employment discrimination and retaliation case. Plaintiff Nixon Winter ("Plaintiff" or "Winter") is a black male of Nigerian national origin. Winter was employed by Defendant Bank of America, N.A. ("Defendant," "Bank of America," or "the Bank") from April 1997 until October 29, 2001. During his employment with Bank of America, Winter

was promoted to the position of banking center manager in January 1999 and to the position of assistant vice president in November 1999.

In March 2000, Winter applied for a position as a client manager in the Bank's Premier Banking group ("Premier Banking"). At that time, there were five openings for the position of client manager. Premier Banking provides high level service to customers with substantial financial relationships with the Bank or to customers who could potentially develop such relationships in the near future. Client managers were expected to develop one-on-one relationships with their customers to make banking easy and convenient and to understand their customers' financial goals and advise them of the appropriate resources and financial services offered by the Bank.

Christine Singh ("Singh"), a senior vice president who was the market manager for South Dallas Premier Banking, interviewed Winter for a client manager position. Although Singh was impressed with Winter in terms of his ability to produce results, she had some other concerns. Specifically, she received negative feedback regarding Winter's interpersonal skills from a co-worker. Additionally, Winter's manager expressed concern regarding his ability to build client relationships over the telephone because his accent might make it difficult for some customers to understand him; nonetheless, Singh wanted to offer Winter the position. Before doing so, however, she arranged for her manager and a few other executives to interview Winter so that they could provide their opinion of him. Singh ultimately decided to promote Winter.[1]

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[1] Apparently, Winter was promoted to the client manager position later in March 2000. The record, however, does not reflect the exact date of the promotion.

On July 9, 2001, Singh met with Winter to address several customer complaints that had been filed against him. In response, Winter questioned the authenticity and the veracity of the complaints. Four days later, on July 13, 2001, Winter submitted a written complaint against Singh to the personnel supervisor, Mary Kanaga ("Kanaga") in which he claimed a hostile work environment. On July 16, 2001, Singh provided Winter with an updated coaching memorandum in which she explained the need to improve his customer satisfaction rating and warned that a failure to do so could result in termination. On October 24, 2001, Winter, Singh and a new personnel supervisor Rich Jiwanlal ("Jiwanlal")[2] met for a formal coaching session and final warning. Winter became upset during this meeting. Five days later, on October 29, 2001, Singh discharged Winter.

On November 19, 2001, Winter filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC"), contending race and national origin discrimination and retaliation. He received a right-to-sue letter from the EEOC on May 30, 2002. On July 26, 2002, Winter filed suit, contending violations of Title VII of the Civil Rights Act of 1964 ("Title VII") and 42 U.S.C. § 1981. Specifically, Winter contends that Bank of America discriminated against him on the basis of his race and national origin when he was discharged. Winter also contends that his discharge was in retaliation for his discrimination complaints against Singh. Bank of America has filed for summary judgment, and Winter has filed for partial summary judgment on liability.

II. *Summary Judgment Standard*

Summary judgment shall be rendered when the pleadings, depositions, answers to interrogatories, and admissions on

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[2] Sometime after Winter filed his complaint against Singh but before the October 24, 2001 meeting, Jiwanlal replaced Kanaga.

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir.1998). A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Ragas*, 136 F.3d at 458. Further, a court "may not make credibility determinations or weigh the evidence" in ruling on motion for summary judgment. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *Anderson*, 477 U.S. at 254-55.

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party's case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. *Matsushita*, 475 U.S. at 586. Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir.1996). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence. *See Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, 513 U.S. 871, 115 S.Ct. 195, 130 L.Ed.2d 127 (1994). The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Ragas*, 136 F.3d at 458. Rule 56 does not impose a

duty on the court to "sift through the record in search of evidence" to support the nonmovant's opposition to the motion for summary judgment. *Id.; see also Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n. 7 (5th Cir.), *cert. denied,* 506 U.S. 832, 113 S.Ct. 98, 121 L.Ed.2d 59 (1992). "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson*, 477 U.S. at 248. Disputed fact issues which are "irrelevant and unnecessary" will not be considered by a court in ruling on a summary judgment motion. *Id.* If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322-23.

III. *Analysis*

A. Defendant's Motion for Summary Judgment

1. Applicable Standard of Proof

Winter and Bank of America disagree regarding the applicable standard of proof on Winter's discrimination claims. Winter maintains that the court should apply the "mixed-motives" analysis found in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 2150, 156 L.Ed.2d 84 (2003).[3] A "mixed- motives" case is one in which the adverse employment decision is motivated by both legitimate *and* illegitimate, that is, discriminatory, reasons. *Waltman v. International Paper Co.*, 875 F.2d 468, 481 (5th Cir.1989).

Bank of America counters that this is a pretext case, and therefore the court should follow the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668

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[3] *Desert Palace* makes clear that direct evidence of discrimination is not necessary to obtain a mixed-motive jury instruction under Title VII. 539 U.S. at ___, ___, 123 S.Ct. at 2150, 2155.

(1973), burden-shifting framework. A pretext case is one in which the "employer has either a discriminatory *or* a non-discriminatory rationale for its actions." *Waltman*, 875 F.2d at 481. (emphasis in original).

As an initial matter the court declines to accept Winter's suggestion that the *McDonnell Douglas* burden-shifting paradigm no longer exists after *Desert Palace.* This would not be an evolution but a revolution in employment discrimination law. If the Supreme Court were going to make a draconian departure from 30 years of well-established employment discrimination precedent, it would have done so with unmistakable clarity. In *Desert Palace,* the Supreme Court does not even intimate that it is overruling, restricting or clarifying *McDonnell Douglas.* Moreover, no Fifth Circuit authority embraces Winter's interpretation of *Desert Palace. See Read v. BT Alex Brown Inc.*, 72 Fed. Appx. 112 (5th Cir.2003).[4]

The court must now determine which analysis applies here. *See Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1217 (5th Cir.1995) (A case need not be labeled as a "mixed motives" case or pretext case from its inception; but at some point, the court must determine whether the case involves mixed motives.). Bank of America contends that this is a pretext case because there is no evidence that it had legitimate *and* illegitimate reasons for discharging Winter and because Winter does not concede that it had any legitimate reason to terminate his employment. The court agrees. Accordingly, this case will be analyzed pursuant to the burden-shifting

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[4] In *Read,* the Fifth Circuit cited to *Desert Palace;* however, it applied the *McDonnell Douglas* burden-shifting framework to the plaintiff's sex and age discrimination claims. If the Fifth Circuit believed that *Desert Palace* abrogated the burden-shifting framework set forth in *McDonnell Douglas,* it certainly would have deemed it necessary to elevate *Read* to the status of a published opinion, rather than making it an unpublished opinion having no precedential value.

framework under *McDonnell Douglas.* Nevertheless, even if the court applied the "mixed motives" analysis, the ultimate burden of proving intentional discrimination remains with the plaintiff. *See Texas Dep't of Comty. Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *see also Read*, 72 Fed. Appx. at 115 (citing *Desert Palace*, 539 U.S. at ___, 123 S.Ct. at 2150).

1. Discrimination

Winter brings claims of race and national origin discrimination[5] under Title VII and § 1981.[6] Under the applicable burden-shifting paradigm for Title VII and § 1981 [7] discrimination claims, Winter must establish a *prima facie* case of

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[5] Although Winter contends that he was discriminated against because of his national origin (Nigerian) and color (black), his claims are indistinguishable. *See Bullard v. OMI Georgia, Inc.*, 640 F.2d 632, 634 (5th Cir. Unit B 1981) (In some contexts, national origin and racial discrimination are "so closely related . . . as to be indistinguishable."). Therefore, the court finds that Winter's race and national origin are so closely related that a separate claim for race discrimination would merely duplicate the national origin discrimination claim. The summary judgment evidence make it unequivocally clear that national origin discrimination is being asserted, and the claims of racial discrimination are simply superfluous. For this reason, the court does not consider them to be separate and distinct claims. Even if one could consider them as separate and distinct claims, the race discrimination claim necessarily fails for the same reasons that the national origin claim fails.

[6] When they are urged as parallel causes of action, the same standard of proof applies to Winter's disparate treatment claims under both Title VII and § 1981. *Shackelford v. Deloitte & Touche, LLP.*, 190 F.3d 398, 403 n. 2 (5th Cir.1999); *Baltazar v. Holmes*, 162 F.3d 368, 373 (5th Cir.1998). For this reason, Winter's Title VII and § 1981 discrimination claims will be analyzed together.

[7] The burden-shifting analysis prescribed in *McDonnell Douglas* for employment discrimination claims is also applicable in suits brought under § 1981. *See Wallace v. Texas Tech Univ.*, 80 F.3d 1042, 1047 (5th Cir.1996).

discrimination; Bank of America must then articulate a legitimate, nondiscriminatory reason for its action; and finally, if the parties satisfy their initial burdens, the case reaches the "pretext stage," and Winter must then adduce sufficient evidence to permit a reasonable trier of fact to find pretext or intentional discrimination. *See McDonnell Douglas Corp.*, 411 U.S. at 802-04; *Burdine*, 450 U.S. at 252-53; *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 425-26 (5th Cir.2000). To establish a *prima facie* case of discrimination for a discharge, Winter must establish: (1) that he is a member of a protected class; (2) that he was qualified for the position; (3) that he was terminated from the position; and (4) that he was replaced by a person outside the protected group, or that he was discharged because of his national origin. *See Byers*, 209 F.3d at 426-27.

Bank of America concedes that Winter can establish a *prima facie* case. Winter contends that this concession precludes summary judgment in favor of the Bank. Specifically, he contends that the existence of a *prima facie* case not only establishes sufficient evidence upon which a reasonable jury could find discrimination but also shifts the burden of proof. The court disagrees. While Winter is correct that a plaintiff can survive summary judgment if a *prima facie* case is established and the defendant does not rebut the presumption of discrimination created by the *prima facie* case, this is not the case here. Bank of America has proffered several reasons as legitimate, nondiscriminatory reasons for discharging Winter. Further, Winter bears the ultimate burden of proving, by a preponderance of the evidence, that the Bank intentionally discriminated against him because of his national origin." *Burdine*, 450 U.S. at 253; *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 219 (5th Cir.2001)).

The court now turns to whether Bank of America has articulated legitimate, nondiscriminatory reasons for terminating Winter's employment. Bank of America contends that

it discharged Winter because of (1) an inordinate number of complaints; and (2) his unprofessional demeanor and insubordinate behavior. As these are legitimate, nondiscriminatory reasons to discharge an employee, Bank of America has met its burden. Now, the burden shifts back to Winter to demonstrate that Bank of America's articulated reasons are a pretext for intentional discrimination.

After a Title VII case reaches the pretext stage, the question for summary judgment is whether a rational factfinder could find that Bank of America intentionally discriminated against Winter on the basis of his national origin. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). A "plaintiff can survive summary judgment by producing evidence that creates a jury issue as to the employer's discriminatory animus or the falsity of the employer's legitimate nondiscriminatory explanation." *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 897 (5th Cir.2002). "Pretext-plus" is not required to support an inference of retaliatory discrimination. *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 223 (5th Cir.2000). "[A] plaintiff' prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminate," and may therefore be enough to prevent summary judgment or judgment as a matter of law. *See Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 148, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000); *Sandstad*, 309 F.3d at 897. This showing, however, is not always enough to prevent summary judgment "if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Reeves*, 530 U.S. at 148. On the other hand, in the context of an unlawful discrimination or retaliation claim,

summary judgment is inappropriate "if the evidence taken as a whole (1) creates a fact issue as to whether each of the employer's stated reasons was what actually motivated the employer and (2) creates a reasonable inference that [national origin] was a determinative factor in the actions of which [a] plaintiff complains." *Vadie v. Mississippi State Univ.*, 218 F.3d 365, 373 n. 23 (5th Cir.), *reh'g denied,* 232 F.3d 212 (5th Cir.2000), *cert. denied,* 531 U.S. 1113, 121 S.Ct. 859, 148 L.Ed.2d 772 (2001) (quoting *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 994 (5th Cir.1996)) (*en banc*).

Winter contends that Bank of America's proffered reasons for his discharge are false. In support of his argument that a pretext exists, Winter contends that (1) the complaints in question were fabricated or a result of misunderstandings; (2) his alleged unprofessional behavior was exaggerated; and (3) a litany of other acts [8] of alleged disparate treatment viewed as a whole support a finding of discrimination. The court determines that Winter has failed to establish that Bank of America's articulated reasons for his discharge were a pretext for intentional discrimination.

First, with respect to the complaints, Winter mistakenly believes that a letter of commendation, dated October 26, 2001,[9] and a subsequent e-mail, dated October 31, 2001, detailing a complaint against Winter by the same customer who sent the letter of commendation call into question all of the complaints filed against him. Winter relies on the

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[8] Winter admits that "he does not seek a remedy for [these] acts, but tenders this evidence as background evidence to prove discrimination and retaliation in his discharge." Plaintiff's Brief Supporting His Response to Defendant's Motion for Summary Judgment ("Pl.Resp.") at 19-20. Therefore, the court need not address the Bank's arguments that some of these acts are time-barred or do not constitute adverse employment actions cognizable under Title VII.

[9] Bank of America objects to the October 26, 2001 letter on the grounds of hearsay. The court overrules the objection.

testimony of Jiwanlal who allegedly stated that based on these two documents he questions all of the complaints against Winter. Winter further contends that prior to the discrepancy illustrated by these two documents he informed the Bank of the questionable nature of all the other complaints previously filed against him in his July 19, 2001 complaint against Singh. He contends, however, that the Bank failed to properly respond to his concerns in that it did not reprimand Singh or otherwise document his complaint in Singh's personnel file, and the personnel manager, Kanaga, failed to conduct a follow-up meeting with him.

Bank of America counters that Winter's termination was not based on either the October 26, 2001 letter or the October 31, 2001 e-mail as they were not received by the Bank until after his discharge. It discounts the testimony of Jiwanlal in which he allegedly states that these two documents call into question all the complaints against Winter. The Bank contends that Jiwanlal was confused and that his confusion is understandable, given that neither of these documents was considered at the time of Winter's termination. Bank of America also contends that these documents are not evidence of fraud as Winter implies but rather evidence of the fickle nature of that customer. Bank of America further counters that it conducted a reasonable review of Winter's complaint against Singh, including requiring her to address, in writing, each of his concerns. The Bank contends that after all the information was reviewed it concluded that no discrimination had occurred, and therefore no reprimand was necessary.

As an initial matter, the court notes that Winter misconstrues Jiwanlal's testimony and takes it totally out of context. The court does not know whether this was done inadvertently or intentionally; however, the effect is the same. Jiwanlal testified that, at best, the October 26, 2001 letter and October 31, 2001 e-mail would only call into question the reliability of the October 31, 2001 complaint. He specifically

states that these documents do not create any doubt as the to reliability of all the other complaints. Appendix to Plaintiff's Brief Supporting His Response to Defendant's Motion for Summary Judgment ("Pl.App.") at 270 (59:10-18).[10] Contrary to Winter's representations to the court, Jiwanlal testified as follows: "But I would *not* say that I'm going to question—I would personally question all of the complaints because of these two letters." Pl.App. at 271 (60:1-3) (emphasis added).

The Bank offers no evidence to support its contention that the October 26, 2001 letter and October 31, 2001 e-mail were not considered when the decision to discharge Winter was made. Nonetheless, even if these documents create a fact question, they do so only as to the validity of this customer's complaint. Winter has offered no competent summary judgment evidence[11] to dispute the existence of the other documented complaints lodged against him in the six months preceding his termination. An "employer may fire an em-

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[10] Jiwanlal testified as follows when questioned about the October 26, 2001 letter and the October 31, 2001 e-mail:

> Q. Does that obvious conflict within two or three days of each other cause you any concern about the reliability of alleged customer complaints that you were hearing about?
>
> A. This one it does but—
>
> Q. Does it create any doubt about any of the others?
>
> A. No, sir, not all of them because I've read several of them and as I indicated before, they all can't be—
>
> Q. They all can't be bogus?
>
> A. Yeah, or manufactured or whatever. I mean, I just—

Pl.App. at 270 (59:10-18).

[11] Bank of America objects on the grounds of hearsay to the allegations in paragraphs 12 and 13 of Winter's affidavit relating to his alleged conversations with customers regarding their complaints. The court sustains the objection, and such statements will not be considered. *See Eason*, 73 F.3d at 1325.

ployee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason." *Nix v. WLCY Radio*, 738 F.2d 1181, 1187 (11th Cir.1984) (citing *Megill v. Board of Regents*, 541 F.2d 1073, 1077 (5th Cir.1976)). "[E]ven an incorrect belief that an employee's performance is inadequate constitutes a legitimate, nondiscriminatory reason. We do not try in court the validity of good faith beliefs as to an employee's competence. Motive is the issue. . . . [A] dispute in the evidence concerning job performance does not provide a sufficient basis for a reasonable factfinder to infer that [the] proffered justification is unworthy of credence." *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir.1995) (quoting *Little v. Republic Refining Co., Ltd.*, 924 F.2d 93, 97 (5th Cir.1991). Further, there is no competent summary judgment evidence that he was treated differently than other similarly situated employees. Accordingly, Winter has not established the existence of a fact question regarding whether the complaints upon which his termination was based were merely a pretext for discrimination.

Second, Winter contends the characterizations of his demeanor and behavior are not credible because the only "witnesses" are Singh and Jiwanlal and because the Bank did not offer any evidence that his former supervisor considered his demeanor or behavior problematic.[12] Bank of America counters that Winter's unprofessional behavior and demeanor were witnessed by more people than just Singh and Jiwanlal, including a co-worker who had personal knowledge of his "belligerent" attitude with a customer and Singh's assistant and two other employees who were frightened by Winter's

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[12] Winter contends that his former supervisor, Joyce Condit, attempted to rehire him after his discharge. Bank of America objects on the grounds of hearsay to the references in paragraph 18 of Winter's affidavit relating to any alleged out-of-court statements by his former supervisor, Joyce Condit. The court overrules the objection.

conduct towards them. Indeed, the Bank notes that during the unemployment compensation process, Winter admitted that at the October 24, 2001 meeting he became upset and angry and walked out of the room. It further contends that it need not present any evidence that his former supervisor experienced problems with his demeanor and behavior because such evidence is irrelevant. The court agrees. The court determines that Winter has offered no competent summary judgment evidence to establish pretext, or create a genuine issue of material fact, with respect to the Bank's characterization of his behavior as insubordinate and unprofessional; nor has he offered any evidence that he was treated differently than other similarly situated employees.

Third, Winter's reliance on the other acts of alleged disparate treatment is misplaced. Winter contends that pretext is established because the following acts constitute disparate treatment: (1) he was not assigned to work in the Bank's Park Cities branch office; (2) he received substandard portfolios; (3) he was given accent management classes; (4) he was without an office for five weeks; and (5) he was not promoted to the position of vice president.

With respect to the Park Cities' assignment, Winter contends that the fact that he was not given this assignment is evidence of discrimination. Bank of America offers evidence that the employee selected for the assignment was better qualified than Winter in that the employee had previously worked in that location and thus had experience with the clientele. The Bank also contends that Winter offers no evidence to dispute its reason for not selecting him for the assignment. The court agrees. Winter's conclusory assertion that he was not selected for the assignment because of his national origin is not competent evidence of discrimination. *See Forsyth*, 19 F.3d at 1533.

With respect to the substandard portfolios, Winter states in his affidavit that he was the only client manager who did not receive a portfolio of existing customers. Winter, however, testified in his deposition that he received a portfolio of at least 260 *existing customers.* Winter does not explain why his affidavit varies from his deposition testimony. Unexplained variances between statements in an affidavit and sworn testimony cannot create a fact question that precludes summary judgment. *S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 495 (5th Cir.1996). Thus, the portions of Winter's affidavit that vary from his sworn deposition testimony are not competent summary judgment evidence, and the court will not consider them. *See id.* Even if Winter had received a less desirable portfolio, he has not presented any evidence to rebut the Bank's explanation for the manner in which portfolios were assigned the to client managers. Therefore, Winter's conclusory assertion that he was given a substandard portfolio because of his national origin is insufficient to establish or create a genuine issue of material fact regarding discrimination because of his national origin. *See Forsyth*, 19 F.3d at 1533.

With respect to the accent management classes, although Winter concedes that "he did not have a problem with the training" (Pl.App. at 48 (35:20-25)), he contends that "no other client managers, with heavy accents, had to attend the classes." Winter, however, does not identify "the other client managers with heavy accents" to which he refers. Thus, the court cannot determine if Winter compares himself to employees who are similarly situated. Further, there is no evidence that the classes were mandatory. Thus, it is conceivable that "the other client managers with heavy accents" to which Winter refers could be individuals of Nigerian descent who declined the opportunity to take these classes. Thus, Winter fails to make a showing that he was treated differently than other similarly situated employees.

With respect to the office issue, Winter contends that he was without an office for five weeks after being promoted to client manager. Bank of America counters that Winter, who was the last person to be offered the position of client manager, was one of two who did not have the requisite licenses for the position. It contends that because of logistical problems, Winter and the other unlicensed client manager did not have permanent offices while they studied for their license examinations. The Bank further offers evidence that Winter received his permanent office before the other client manager. Even if Winter had received his office last, he has not presented any evidence to rebut the Bank's explanation for his not having received an office immediately upon his promotion to client manager. While it is true that he did not have an office for five weeks, Winter's conclusory assertion that the reason that he did not have one is because of his national origin is not competent summary judgment evidence. *See Forsyth*, 19 F.3d at 1533.

With respect to the vice president position,[13] Winter contends that he was treated differently than Derwood Richardson, a white client manager who was promoted to vice president. Bank of America counters that Winter and Richardson were not similarly situated because Richardson did not have as many complaints lodged against him as did Winter.[14] Winter provides no evidence that complaints were

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[13] Winter does not bring a failure to promote claim against Bank of America. Pl. Resp. at 20. Instead, he tenders this issue as "background evidence" to support his discriminatory discharge claim.

[14] Bank of America also contends that the standards for promotion to the position of vice president changed after Richardson was promoted to vice president. Whether a fact question exists regarding promotion to vice president is of no moment because this issue is not before the court, as Winter does not allege in his complaint a failure to promote claim against the Bank. Thus, a fact question, if any, is not a *material* fact question that can preclude summary judgment. *See Anderson*, 477 U.S. at 248.

filed against Richardson as frequently as against him. *See also Telkamp v. Stein Mart, Inc.*, 2002 WL 324288 * 7 n. 4 (N.D.Tex.2002) (holding that the plaintiff who received a final warning as a result of a workplace incident was not similarly situated to the other employee involved in the incident who did not receive a final warning because the plaintiff had previous disciplinary complaints). "[T]he conduct at issue is not nearly identical when the difference between the plaintiff's conduct and that of those alleged to be similarly situated accounts for the difference in treatment received from the employer." *Wallace*, 271 F.3d at 221 (citation omitted). Therefore, Winter failed to establish that he and Richardson were similarly situated.

The court has addressed and disposed of the arguments asserted by Winter for his belief that the stated reasons by Bank of America were a pretext for intentional discrimination. Bank of America, however, sets forth other evidence which negates the existence of pretext. First, Winter was not treated differently than any similarly situated employee. The undisputed evidence reveals that no other employee had the documented interpersonal and behavioral problems as did Winter. Second, Singh both promoted and fired Winter. Under the "same actor" doctrine, when the same individual makes the decision to hire the plaintiff and later to fire the plaintiff, there is an inference that [national origin] discrimination was not the motive behind [the] termination." *Brown v. CSC Logic, Inc.*, 82 F.3d 651, 658 (5th Cir.1996). The reason for the doctrine is that the decisionmaker's presumed animus against the protected class, as the motive for the termination, is inconsistent with the decision to hire the plaintiff in the first place. *Id.* The "same actor" doctrine creates only an inference, which can be overcome by sufficient evidence the that stated reason for the termination was pretext for discrimination. *Id.*

Winter contends that whatever weight the same actor doctrine might have it is nullified by discriminatory comments allegedly made by Singh. Singh allegedly told Winter that (1) he should get his teeth fixed; (2) he should wear nicer work clothes; (3) his accent was too prominent; (4) rich white women in the Highland Park area did not like dealing with minorities, especially black men; and (5) she suspected a Nigerian client when she learned that the client's account had been the subject of a fraudulent wire transfer that originated in Nigeria.

With respect to the first two comments, the court determines that they do not even arguably involve discriminatory animus. To the court's knowledge, no racial or ethnic group has a monopoly on good teeth or nice clothes. Although these comments can be considered insensitive, offensive and rude, they are insufficient to infer national origin discrimination. *See Boyd v. State Farm Ins. Cos.*, 158 F.3d 326, 329-30 (5th Cir.1998), *cert. denied,* 526 U.S. 1051, 119 S.Ct. 1357, 143 L.Ed.2d 518 (1999) ("The mere utterance of a racial epithet is not indicia of discrimination under Title VII".). While the third comment could arguably involve discriminatory animus, the facts in this case negate such a finding. It is undisputed that Winter acknowledged that his accent was prominent and appreciated being offered the accent management classes. Indeed, Winter admits that the classes assisted him in achieving one of his personal goals.

Bank of America contends that the last two comments amount to stray remarks. The court agrees. Stray remarks can be considered as evidence of pretext (as Winter argues), but only when accompanied by sufficient indicia of relevance—essentially, the four-part test originated in *Brown* and still recognized by the Fifth Circuit post*Reeves:* For comments in the workplace to provide sufficient evidence of discrimination, they must be (1) related to the protected class of persons of which the plaintiff is a member; (2) proximate in

time to the terminations; (3) made by an individual with authority over the employment decision at issue; and (4) related to the employment decision at issue. *Auguster v. Vermilion Parish Sch. Bd.*, 249 F.3d 400, 405 (5th Cir.2001) (citations, internal quotation marks, and internal brackets omitted). Given the state of the evidence, assuming Singh made the statements attributed to her, the court characterizes them as stray remarks which are offensive and rude but insufficient to infer discrimination. *See Boyd*, 158 F.3d at 329-30.

The evidence in this case clearly reveals that Winter was terminated, not for his national origin, but because of the number of complaints filed against him and his unprofessional and insubordinate behavior. The court will not second-guess the Bank's personnel decision. *See Walton v. Bisco Indus., Inc.*, 119 F.3d 368, 372 (5th Cir.1997). Moreover, no evidence in the record creates an issue of fact that Bank of America treated Winter differently from other similarly situated employees. Accordingly, summary judgment is appropriate on behalf of Bank of America on Winter's discrimination claims.[15]

2. Retaliation

Winter also brings a retaliation claim. Specifically, Winter contends that he was discharged for submitting his July 13, 2001 complaint against Singh.

Title VII makes it "an unlawful employment practice for an employer to discriminate against any of his employee" who had either availed themselves of Title VII's protections or assisted others in so doing. *See* 42 U.S.C. § 2000e-3(a).

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[15] Winter's § 1981 claim fails for the same reason as does his Title VII claim. *See Shackelford*, 190 F.3d at 403 n. 2; *Baltazar*, 162 F.3d at 373.

Winter offers no direct evidence of retaliation.[16] The court therefore assesses his claims under the *McDonnell Douglas* framework. *See Montemayor v. City of San Antonio*, 276 F.3d 687, 692 (5th Cir.2001). To establish a *prima facie* case of retaliation under Title VII, a plaintiff must demonstrate that: (1) he engaged in a protected activity; (2) he experienced an adverse employment action following the protected activity; and (3) a causal link existed between the protected activity and the adverse employment action. *Id.; Mota v. University of Texas Houston Health Science Center*, 261 F.3d 512, 519 (5th Cir.2001). The burden of production then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its action. *Id.* Once the defendant does so, the inference of discrimination created by the *prima facie* case disappears, and the ultimate question becomes whether the protected conduct was the "but for" cause of the adverse employment action. *Id.*

Bank of America has failed to establish that there is no evidence to support Winter's retaliation claim. Indeed, the Bank's entire brief, except for the legal standard for retaliation, is devoted to Winter's discrimination claims. Other than a recitation of the standard, there is no discussion or analysis of Winter's retaliation claim. The Bank appears to take the position that if no discrimination exists there can be no retaliation. Such a position does not correctly reflect the law. To prevail on a retaliation claim, one need not prove an underlying discrimination claim. *See Vadie*, 218 F.3d at 374 n. 24 (citing *Shackelford*, 190 F.3d at 405 n. 4). "Similarly, evidence sufficient to support a claim of retaliation is not necessarily sufficient to support a claim of discrimination." *Id.* Accordingly, Bank of America is not entitled to judgment as a matter of law on Winter's retaliation claim.

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[16] As the court determines that *Desert Palace* is inapplicable to a retaliation case, it declines Winter's invitation to apply the holding of *Desert Palace* to his retaliation claim.

B. Plaintiff's Motion for Partial Summary Judgment on Liability

Winter moves for partial summary judgment on the issue of liability. Specifically, he contends that because Bank of America conceded the existence of a *prima facie* case of discrimination and it failed to assert a "mixed motives" defense, he is entitled to judgment as a matter of law pursuant to the holding in *Desert Palace.* Bank of America counters that Winter misconstrues the holding and applicability of *Desert Palace,* and in any event, it asserted an affirmative defense broad enough to invoke a "mixed motives" defense.

The court has already determined that this case is not a "mixed motives" case, and it has granted summary judgment on Winter's discrimination claims to Bank of America. The court has also determined that *Desert Palace* is inapplicable to a retaliation claim. Accordingly, the court determines that Plaintiff is not entitled to judgment as a matter of law on the issue of liability.

IV. *Conclusion*

For the above stated reasons, genuine issues of material fact exist with respect to Winter's retaliation claim. Therefore, summary judgment is denied with respect to this claim. No genuine issues of fact exist with respect to Winter's discrimination claims. Thus, the court grants summary judgment on these claims. Accordingly, the court grants in part and denies in part Defendant Bank of America, N .A.'s Motion for Summary Judgment; and denies Plaintiff's Motion for Partial Summary Judgment on Liability. Plaintiff's discrimination claims under Title VII and § 1981 are dismissed with prejudice, and Plaintiff's retaliation claim remains for trial.